DEPARTMENT OF THE ARMY PAMPHLET 27–100–22

MILITARY LAW REVIEW

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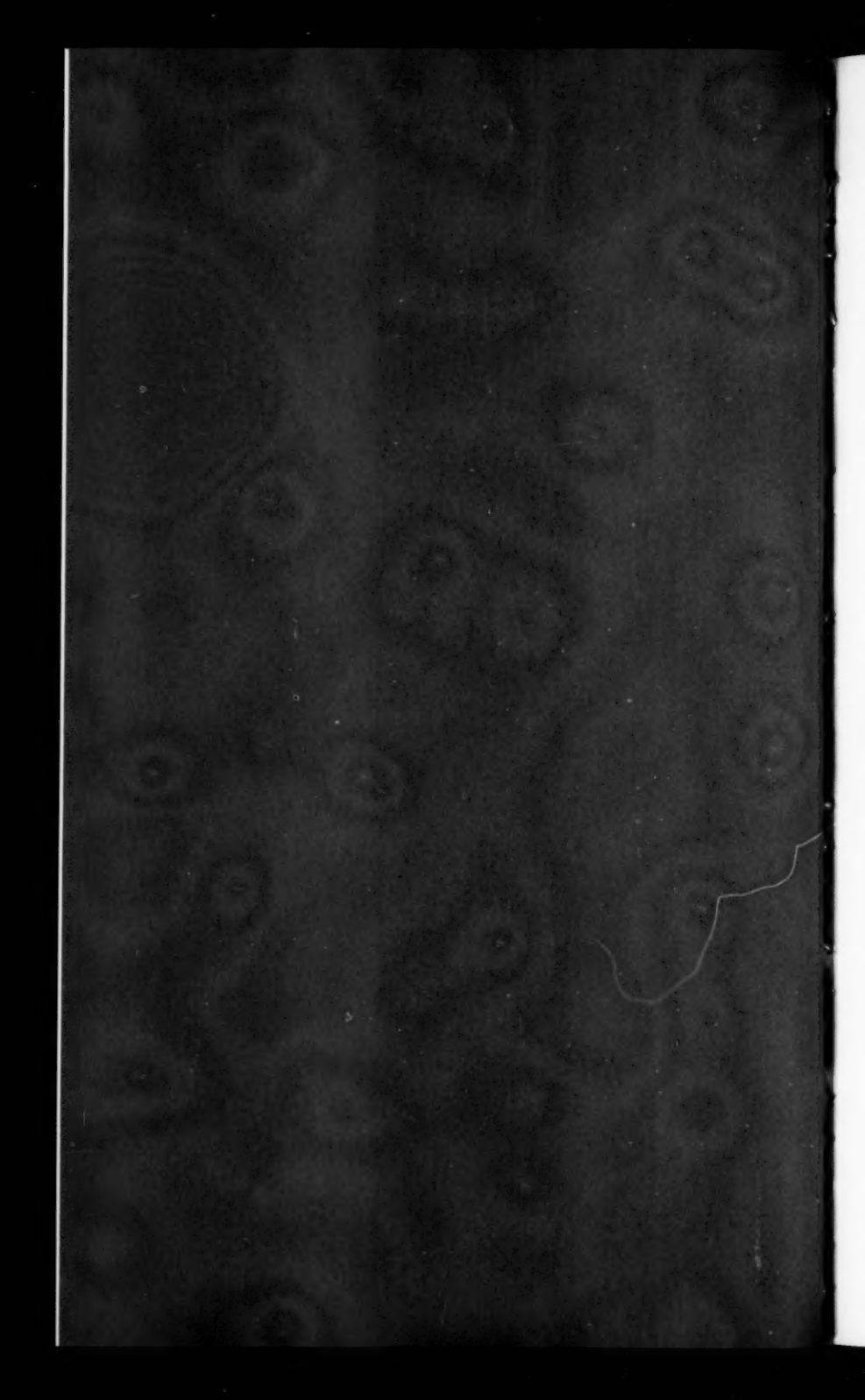

PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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WILLIAM TUDOR

Judge Advocate General

1775–1777

On 30 June 1775, the first "Articles of War" were enacted by the Continental Congress. Pursuant to those Articles, the position of Judge Advocate of the Army was created on 29 July 1775, and William Tudor, an eminent Boston lawyer, was appointed to the position on the same day. On 10 August 1776, he was designated Judge Advocate General and given the rank of Lieutenant Colonel in the Army of the United States.

William Tudor was born in Boston, Massachusetts, on 28 March 1750. At the age of sixteen, he entered Harvard College and in 1769, after compiling an outstanding scholastic record, was graduated valedictorian of his class.

After graduating from Harvard he entered the office of John Adams, the then most prominent lawyer in New England, and pursued the study of law for the following three years. Adams and he became lifelong friends and correspondents. On 27 July 1772 he was admitted to the Bar of Suffolk, Massachusetts, and soon became a leader of the New England Bar.

He became active in the cause of independence and joined the Continental Army shortly after Lexington. Although resigning the office of Judge Advocate General on 10 April 1777, he served in the field as a Lieutenant Colonel for the duration of the war. He resigned from the Army in 1778, brevetted a colonel.

During the Revolutionary War Colonel Tudor received wide publicity for the marked ability with which he conducted the court-martial defense of Colonel David Hensley in January of 1778. Colonel Hensley was accused by General Burgoyne of cruelty to the British troops who had been taken prisoners of war after the Battle of Saratoga. Burgoyne was permitted by the court-martial to prosecute his charges personally. Despite the eloquence of Burgoyne, Colonel Tudor secured Hensley's acquittal.

With the end of the Revolutionary War, Colonel Tudor resumed his practice of law. In 1796 his father died, leaving his son a large inheritance. Thereafter, Colonel Tudor gave up his law practice and until 1807 travelled extensively in Europe. During his European sojourn he was received by the King of England

and also renewed old friendships with General Lafayette and other French officers who had served on Washington's staff.

Colonel Tudor had a distinguished political career in his native state of Massachusetts. He was a member of the Massachusetts House of Representatives from 1791 to 1795, and the Senate of the Commonwealth of Massachusetts from 1801 to 1803; Secretary of the Commonwealth of Massachusetts from 1808 to 1809; and Clerk of the Supreme Court of Massachusetts from 1811 until his death in 1819.

Colonel Tudor was regarded as one of the leading public-spirited men of Massachusetts. He was a founder of the Massachusetts Historical Society and a member of numerous charitable and veterans' organizations. From 1811 until his death, he was Vice-President of the Massachusetts Society of the Cincinnati, the leading veterans' organization of its day.

Colonel Tudor married in 1778 and had three sons and two daughters. His eldest son, William Tudor, was the well known American editor.

Colonel Tudor died in Boston, Massachusetts, on 8 July 1819.

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GOVERNMENT-CAUSED DELAYS IN THE PERFORMANCE OF FEDERAL CONTRACTS: THE IMPACT OF THE CONTRACT CLAUSES*

BY MAJOR ROBERT B. CLARK**

I. INTRODUCTION

It has been said that delays in the performance of Government contracts have accounted for more losses and a greater percentage of business failure than any other single factor in the field of Government procurement.[1] We are all aware of the example of the over optimistic or inefficient contractor who is forced to pay liquated damages because he has not been able to complete his work on time, but the contractor is not the only party who can cause delays. In a surprising number of cases it is the Government, rather than the contractor, who is responsible for a work stoppage. The Court of Claims has been called upon over one hundred times to decide claims based upon Government-caused delays. The various administrative boards established to handle factual disputes under Government contracts are continually required to resolve disputes arising from delays caused by the Government. As will be seen, the problem has significance for both parties to the contract.

The purpose of this article is to examine the law relating to the Government's responsibility for delays which it causes, to trace the development and ascertain the impact of certain standard and optional contract clauses which affect this responsibility, to reach conclusions as to whether revision or broadened application of current clauses is desirable and, finally, to make recommendations for possible improvements. The problem arises primarily in fixed price contracts, advertised or negotiated, and examination is limited to this type contract.

How, then, does the Government cause delays? Total categorization of the many reasons why the Government voluntarily or

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eleventh Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Gaskins, *Delays, Suspensions and Available Remedies Under Government Contracts*, 44 MINN. L. REV. 75 (1959).

involuntarily stops work on a contract is impossible, unless, of course, a rather meaningless "miscellaneous" category [2] is included. However, a general breakdown by factual situations will prove helpful in understanding the problem.

Usually delays will fall into one of the following categories: (a) cases where the Government orders changes in the work after the contract has been signed, (b) cases where the Government fails to make a site available for the work, (c) cases where the Government fails to provide promised material or property for incorporation or guidance in the work, and (d) cases where a so-called "sovereign" act of the Government delays the work. Before discussing the law relating to each of these areas, a brief examination of the effects of delay on contract costs is appropriate.

Decisions of the Court of Claims show that delays, regardless of how caused, increase contract costs in at least three ways: *First*, certain expenses continue whether or not work is being performed. These are normally called "stand-by" costs. For example, laborers cannot be laid off until the extent of delay is known,[3] salaried supervisors must be kept on the payroll,[4] equipment must remain on the site,[5] a field office must be maintained [6] and a proportional share of home office expenses paid.[7] Sometimes it is possible to cut stand-by costs by transferring equipment and personnel to another job. Other times this is impossible. *Second*, there are costs directly related to stopping and starting,[8] including protective maintenance of idle equipment and the retraining of new workers.[9] *Third*, there are costs which result from the extension of time necessary to complete the work: wages and prices may increase,[10] bargains and discounts may be lost,[11] work may unexpectedly have to be performed in winter weather with loss of efficiency and heating requirements,[12] additional pre-

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[2] Included among such miscellaneous delays might be those pursuant to terminating a contract for the convenience of the Government, those required because of an exhaustion of appropriations and those for which no reason can be found.

[3] Largura Constr. Co. v. United States, 88 Ct. Cl. 531 (1939).

[4] Herbert M. Baruch Corp. v. United States, 92 Ct. Cl. 571 (1941).

[5] Henry Ericsson Co. v. United States, 104 Ct. Cl. 397, 62 F. Supp. 312 (1945).

[6] F. H. McGraw & Co. v. United States, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

[7] Reiss & Weinsier, Inc. v. United States, 126 Ct. Cl. 713, 116 F. Supp. 562 (1953).

[8] See Parish v. United States, 120 Ct. Cl. 100, 98 F. Supp. 347 (1951).

[9] See Joplin v. United States, 89 Ct. Cl. 345 (1939).

[10] See Langevin v. United States, 100 Ct. Cl. 15 (1943).

[11] See Kelly & Kelly v. United States, 31 Ct. Cl. 361 (1896).

[12] See Kirk v. United States, 111 Ct. Cl. 552, 77 F. Supp. 614 (1948).

miums must be paid for bonds and insurance.[13] Finally, there is a loss of profit,[14] for an anticipated gain must now be spread over a longer period and a new job cannot be started.

The foregoing are intended only as examples of the effects of delay and any accountant could add substantially to the list. For the purpose of this discussion we shall consider any increase in cost resulting from delay as a "delay cost." As can be seen, the problem is more dramatically portrayed in construction contracts, but it can be equally acute in the supply field.

With this introduction we can turn to an analysis of the law as applied to specific areas of delay by the Supreme Court and the Court of Claims.

II. THE LAW OF GOVERNMENT-CAUSED DELAYS

A. *DELAYS CAUSED BY CHANGE ORDERS*

Government contracts, both supply and construction, currently give the Government the right to order changes in the work.[15] This results in the most frequent instance of Government-caused delay. Of course, a change order does not necessarily create delay. Sometimes, the Government acts with promptness, and the nature of the change does not extend the time needed to complete the contract. On other occasions the Government does not (or cannot) act promptly. It knows the work must be changed, but the full details as to how it is to be changed have not been worked out. In this instance a stop order is issued and the contractor must wait for new plans.

The effects of a change order are not necessarily limited to the particular items changed. For these portions, the Government makes an "equitable adjustment" in price and the contractor is reimbursed for his increased costs, if any.[16] However, the cost of unchanged work may also be affected. The time required to execute the changed work may push the unchanged work into a period of higher prices. In this event, the order of production between changed and unchanged work becomes important. A similar condition will result if the Government is not prompt in determining the nature of the changes. The significance of the distinction between changed and unchanged work will become apparent upon examination of the law.

The traditional starting point in any discussion of the law re-

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[13] See G. Schwartz & Co. v. United States, 89 Ct. Cl. 82 (1939).

[14] See McCloskey v. United States, 66 Ct. Cl. 105 (1928).

[15] Standard Form 23–A (Construction Contract) (April 1961 ed.); Standard Form 32 (Supply Contract) (September 1961 ed.).

[16] *Ibid.*

lating to change orders is *Chouteau v. United States.*[17] There, for the first time, the Supreme Court interpreted a clause giving the Government the right to make changes in a contract while the work was in progress. Prior to *Chouteau* the Supreme Court had held that once the contract was made the United States had no right to interfere with the work. Either the Government cooperated with the contractor, or it was liable for breach of contract.[18] But these early cases did not settle the law, for in none did the Government expressly reserve the right to make changes.

Chouteau has an interesting background.[19] In July 1863, the Government entered into a contract with one McCord for the construction of an ironclad steam battery, the Etlah. The vessel was to be built at St. Louis and completed in eight months' time. Ironclads were, of course, a novelty and on the basis of the battle experience of the few "Monitors" then in service, constant improvements were being made. To permit incorporation of improvements during the construction period, the contract contained the following clause:

> It is further agreed, that the parties of the second part [the Government] shall have the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work, as they may deem necessary and proper, and if said alterations and additions cause extra expense to the parties of the first part [the contractor], they will pay for the same at fair and reasonable rates.[20]

From time to time the Government suspended work on the contract and ordered changes in the plans. As a result, the Etlah was not completed until November 1865, almost 18 months after the scheduled completion date. In the meantime, the price of labor and materials had risen sharply in the St. Louis area. McCord was reimbused for the increased cost of the changed work, but he received nothing for the increase in cost of unchanged work.

McCord sued in the Court of Claims alleging that the Government's actions in delaying him through the many change orders constituted a breach of contract. The court found no breach and held that the Government had the privilege of ordering changes under the contract. It reasoned that the Government would be

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[17] 95 U.S. 61 (1877).

[18] United States v. Speed, 75 U.S. 77 (1868); Clark v. United States, 73 U.S. (6 Wall.) 543 (1867).

[19] For the complete background of this case, including original correspondence, see generally Speck, *Delays, Damages and Government Contracts—Constructive Conditions and Administrative Remedies*, 26 GEO. WASH. L. REV. 505 (1958).

[20] McCord v. United States, 9 Ct. Cl. 155, 159 (1873).

liable for delay costs only if it abused its privilege by taking an unreasonable length of time in ordering changes; that here there was no abuse because all changes had been made within a reasonable period of time.[21]

By this time McCord had gone bankrupt and the case was taken to the Supreme Court by Chouteau, his assignee. Here a slightly different view was taken. No mention was made of the reasonableness or unreasonableness of the length of time involved in making the changes. Rather, it was held, the parties had contemplated there would be delays as shown by the Changes clause. This provided compensation for any work that had been changed, "but for any increase in the cost of work not changed, no provision was made." As for the rise in prices which had proved so costly to the contractor in performing unchanged work, this was "one of the elements which he takes into account when he makes his bargain."[22]

Following *Chouteau,* the Supreme Court continued to hold the Government liable for breach when, in the *absence* of a Changes clause, it suspended a contract to consider or order alterations.[23] But apparently the Government had taken the cue and included a Changes clause as standard contract procedure. After 1885, there is no reported litigation over a contract without a Changes clause.

The Court of Claims has had numerous opportunities to consider the effect of the Changes clause. Notwithstanding the Supreme Court's failure specifically to approve the test of reasonableness, the Court of Claims continues to apply this standard in determining whether the Government has breached by delay in ordering a change. The rule is generally applied liberally in favor of the Government. For example, long delays were approved as reasonable in the construction of battleships.[24] The Government had purchased a privilege and if the arrangements were not satisfactory to the contractor he should not have signed the bargain.

However, it was not a one-way street for the Government. In 1943, the Court of Claims was faced with a particularly aggravated case where a construction contractor had been ordered to stop pending changes, told to start work under a change order and then ordered to go back to the original plans. The Court of Claims held that the Government had been unreasonable to the

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[21] *Id.* at 169.

[22] Chouteau v. United States, 95 U.S. 61, 68 (1877).

[23] United States v. Mueller, 113 U.S. 153 (1885).

[24] Newport News Shipbldg. Co. v. United States, 79 Ct. Cl. 1 (1934); Moran Bros. Co. v. United States, 61 Ct. Cl. 73 (1925).

extent of 49 days delay and granted recovery of delay costs for both changed and unchanged work.[25] Since then the cases have gone both ways on a more or less *ad hoc* basis.[26] In cases where it grants recovery, the court determines the total delay, subtracts that portion which it believes would have been reasonable and permits recovery of delay costs for the remainder.[27]

Not since *Chouteau* has the Supreme Court been faced squarely with a case which concerned delay caused by change orders. It has, however, denied certiorari in at least one case where the Court of Claims has granted recovery for unreasonable delay.[28]

B. *DELAYS CAUSED BY A FAILURE TO MAKE A SITE AVAILABLE*

On occasion the Government will delay a contractor by failing to make a site available or by failing promptly to issue a "notice to proceed". This problem is primarily restricted to construction contracts. Sometimes the Government is at fault; by better planning or more diligent efforts the site could have been made ready or the order to proceed issued. Other times the circumstances are beyond the control of either party, as when proper testing fails to disclose subsurface defects or when winter weather suddenly strikes. Often another contractor is involved, whose work must be finished before the delayed contractor can start. Nowhere is the tug of war between the Supreme Court and the Court of Claims better displayed than in this area.

Kelly & Kelly v. United States [29] offers a good example of the early attitude of the Court of Claims toward delay of this type. In 1888 the Government had contracted to build a marble post office at an unspecified site in Chattanooga. The building was to be completed within 22 months from the date of the contract. This provided that if the contractor did not complete the building on time he would be liable for $100.00 per day in liquidated damages, but if he was delayed by the fault of the Government he would receive an extension of time equal to such delay—a primitive form of the present Delays-Damages clause. Thirteen months

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[25] Severin v. United States, 102 Ct. Cl. 74 (1943).

[26] *Compare* F. H. McGraw and Co. v. United States, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955) (159 day delay unreasonable) *with* Magoba Construction Co. v. United States, 99 Ct. Cl. 662 (1943) (244 day delay reasonable).

[27] See, *e.g.*, J. A. Ross & Co. v. United States, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).

[28] Continental Ill. Nat'l Bank & Trust Co. v. United States, 121 Ct. Cl. 203, 101 F. Supp. 755, *cert. denied*, 343 U.S. 963 (1952).

[29] 31 Ct. Cl. 361, 374 (1896).

passed before the Government finally determined exactly where the building would be located. In the meantime, the proposed marble subcontractor went bankrupt and the contractor was forced to buy on the open market at an increased price. Additionally, supervisors and clerks had to be paid during the entire period of delay. The Court of Claims considered the Government's actions as unreasonable and a breach of contract. It expressly rejected a contention that the contractor was entitled only to an extension of time under the Delays-Damages clause and awarded damages for both the increased prices and the delay-caused wages.

The Supreme Court first spoke on the subject in 1926 in *H. E. Crook Co. v. United States*.[30] There a contractor was to install plumbing in two buildings being built by another contractor at the Norfolk Naval Yards. The work was to be completed 200 days from the date the contractor received the contract. Almost a year went by from this date before the buildings were ready for the work, during which time wages increased. The Court of Claims held that the delay constituted a breach of contract by the Government, but that by continuing to work the contractor had waived any claim.[31] Justice Holmes found no breach. In his view the work schedule and completion date were only "provisional," as evidenced by the contract itself. This reflected that the buildings were only in progress. It also provided no remedy other than an extension of time in the event of Government-caused delays, and impliedly gave the Government the right to delay under the Changes clause. Thus he felt the "whole frame" of the contract shut out a claim for delay which seemed to him to be unavoidable.

In *Crook* one can almost feel the Court straining to prevent recovery of delay costs. The Supreme Court's attitude toward contractors was then by no means friendly, as shown by Justice Clarke's oft-quoted statement regarding delays:

> Men who make million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in the other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as we are complained of by the higher price exacted for the work.[32]

The Court of Claims was not deterred by *Crook*, probably because of its peculair facts, and went right on holding the Government liable for breach whenever it felt the Government had unduly

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[30] 270 U.S. 4 (1926).
[31] 59 Ct. Cl. 593, 597 (1924).
[32] Wells Bros. Co. v. United States, 254 U.S. 83, 87 (1920).

delayed a contractor in getting started.[33] But in 1943, the two courts were again faced with the problem in *United States v. Rice*.[34]

In the law of delays no case has been cited for as many different propositions or with greater frequency than *Rice*. The facts were relatively simple. A plumbing and heating contractor had agreed to install equipment in a Veteran's Hospital to be built by another contractor at Togus, Maine. The contract strictly required completion of the work in 250 days from the date of "notice to proceed." The usual time extension was provided for Government-caused delays. There were also the standard Changes clause and a Changed Conditions clause, both of which gave the Government the right to alter the work in which event the contractor would be entitled to an "equitable adjustment" in price.

The contractor had been informed by the Government that the "notice to proceed" would be issued in the spring of 1932. Relying on this information, he had computed his bid on the basis of having the building covered by the time winter arrived. The "notice to proceed" was issued on May 9, 1932, as predicted. But when the contractor arrived on the site he found that the Government had stopped work by the building contractor because of subsurface defects. Tests were made and the site of the building was changed. Not until October 8, 1932, was the contractor able to get started. His work was pushed into winter with a 50 percent loss of efficiency plus substantial delay costs.

The Court of Claims felt the delay costs were properly compensable under the equitable adjustment provisions of the Changed Conditions clause.[35] On certorari, Justice Black disagreed. He denied recovery, reasoning: first, the contract dates were only "tentative" as the Government had reserved the right to make changes (citing *Crook*) ; second, in changing the site the Government had merely exercised its rights under the Changes or Changed Conditions clauses; third, none of the work had actually been changed and delay costs relating to unchanged work were not proper charges under the "changes" clause (citing *Chouteau*). It seemed "wholly reasonable" to him that an increase in the time required to complete the contract be met with an in-

[33] Ross Eng'r Co. v. United States, 92 Ct. Cl. 253 (1941); Schmoll v. United States, 91 Ct. Cl. 1 (1940); MacDonald Eng'r Co. v. United States, 88 Ct. Cl. 473 (1939); McCloskey v. United States, 91 Ct. Cl. 1 (1928).

[34] 317 U.S. 61 (1942).

[35] Rice v. United States, 95 Ct. Cl. 84, 100, 101 (1941). The building contractor recovered all of his delay costs under the Changed Conditions clause.

crease in time allowed. However, he felt the equitable adjustment under the clause plainly applied "to the changes in cost due to structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the 'difference in time' provision."

Rice would seem to have settled the matter, but the Court of Claims was willing to give it only narrow interpretation. One year later, when the Government failed to have a site ready in what was termed "an arbitrary disregard of the contractor's rights," the Court of Claims said:

> We do not construe the *Rice* case as holding that affirmative action or failure of the defendant to discharge its obligations under the contract could be cured by simply waiving liquidated damages . . . . We do not think the official of the defendant should be permitted to 'kick the contractor all over the lot' and escape responsibility . . . . If such construction were made, it would certainly cost the defendant heavily in the form of higher bids in all future contracts.[36]

But the Supreme Court was to have another word on the matter. In *United States v. Howard P. Foley Co.*[37] the contractor agreed to install runway lighting at the Washington, D.C., National Airport; 120 days were allowed for the job from the "notice to proceed." The work was to be done in segments and as the Government crews finished each runway it was turned over to the contractor. The "notice to proceed" was issued and the contractor started, but failures in a noval method of construction resulted in long delays in turning over the runways, at considerable expense to the contractor. The Court of Claims made a valiant effort to distinguish *Rice* and *Crook*,[38] but the Supreme Court held these cases were controlling. Justice Black again wrote, but this time in a split decision. He felt the Government could not be held liable unless the contract could be interpreted to imply an "unqualified warranty" to make the site available at a particular time. Here, as in *Rice*, he could find no warranty because the Government had reserved the right to make changes and the Delays-Damages clause set forth the procedure to be followed for Government caused delays, i.e., a time extension. Finally, even if the completion date could be "stretched" into implying a condition that the Government exercise the highest diligence, no negligence had been shown.

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[36] Rogers v. United States, 99 Ct. Cl. 393 (1943). *But see* Barnes v. United States, 96 Ct. Cl. 60 (1942) (No recovery for over four months delay).

[37] 329 U.S. 64 (1946).

[38] Howard P. Foley Co. v. United States, 105 Ct. Cl. 161, 171–75, 63 F. Supp. 209, 214–16 (1945). There had been no change order and the Government itself, rather than another contractor, was preparing the site.

A minority of three dissented, believing that by issuing the "notice to proceed" the Government had bound itself to the scheduled completion period.

As will be seen, the Court of Claims has limited the full effects of *Foley* (which would seem to bar all claims for delay costs) in situations which do not deal with site availability. However, in the area of site availability they have been compelled to follow the clear mandate of the Supreme Court. They still use terms such as "fault" or "negligence," [39] but have granted recovery only when they have been able to find an "unqualified warranty" to have the site ready.[40]

C. *DELAYS CAUSED BY A FAILURE TO DELIVER PROMISED MATERIAL*

Commonly, a Government contract may require the contractor to use Government-furnished property in completing the work. Both construction and supply contracts may contain such provisions. The items concerned may be physically incorporated into the work as cloth for uniforms or steel for a building, or the item might be a model to be followed during performance. When the Government fails to deliver as promised, delays result and the contractor incurs delay costs. While the contract provides that the Government *will* furnish material, it seldom specifies an exact date when such delivery will be made. Specifying a delivery date is usually impossible because of uncertainty as to when the contractor will get started. This creates a problem as to interpreting just what the Government has promised insofar as time of delivery.

Prior to the Supreme Court's decision in the *Foley* case, the Court of Claims had held that the Government's failure to deliver when the contractor was ready constituted a breach of contract.[41] Delay costs were recoverable as damages, and no mention was made of the degree of diligence the Government had employed or of the fact that an exact delivery date had not been specified. *Foley* was to change this.

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[39] See, *e.g.*, Arundel Corp. v. United States, 121 Ct. Cl. 741 (1952); Cauldwell-Wingate Co. v. United States, 109 Ct. Cl. 193 (1947).

[40] Abbett Electric Corp. v. United States, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958). The Court of Claims construes a promise to issue a "notice to proceed" within a certain number of days from the date of award as an unqualified warranty.

[41] Donnell-Zane Co. v. United States, 75 Ct. Cl. 368 (1932); Goldstone v. United States, 61 Ct. Cl. 401 (1925).

It will be recalled that *Foley* dealt with the problem of site avialability, rather than the delivery of material. However, because of the strong language that the Government would not be liable for delay costs in the absence of an unqualified warranty, the Court of Claims felt obliged to apply this rule in the area of Government-furnished property. The J. J. Kelly Company was the first contractor to feel the effects of the change in attitude.[42] This company had been delayed when the Government failed to deliver certain secret units which were essential to the construction. The Court of Claims denied a claim for delay costs. Judge Jones found the contract contained no warranty of a particular delivery date. He therefore concluded that under *Foley* the contractor was entitled only to an extension of time pursuant to the Delays-Damages clause. He made it clear, however, that he found it difficult to follow the Supreme Court's logic, and he recommended that the Delays-Damages clause be revised to exclude cases where the Government was at fault:

> To anyone at all familiar with the practical side of construction, it must be readily apparent that a mere extension of time within which to allow the contractor to complete the contract does not at all compensate him for losses which he may sustain by virtue of delays which are due to wrongful acts on the part of the Government. . . . If therefore, the article is allowed to remain in its present form, contractors in making their bids will necessarily make allowances for these possibilities. . . .[43]

Judges Whitaker and Madden concurred, but expressly disassociated themselves from any view which would construe *Foley* to absolve the Government from liability for delays which could have been avoided by "the exercise of ordinary diligence."[44]

Four weeks later, in *George A. Fuller Co. v. United States*,[45] Judge Whitaker led the Court of Claims around *Foley*. The Government had promised to furnish this contractor with certain models and it had delayed in doing so to the contractor's detriment. Judge Whitaker distinguished *Crook and Rice* on the basis that in those cases the Government had reserved the right to delay the contractor, whereas here it had not. He distinguished *Foley* on the grounds that there the Government had not warranted any action on its part, whereas here, even in the absence of a specific delivery date, the Government "was bound to furnish them [the models] on time as much as if an express provision to this effect had been incorporated into the contract." He then

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[42] See J. J. Kelly Co. v. United States, 107 Ct. Cl. 594, 69 F. Supp. 117 (1947).

[43] *Id.* at 604, 605; 69 F. Supp. at 120.

[44] 107 Ct. Cl. at 606; 69 F. Supp. at 120, 121.

[45] 108 Ct. Cl. 70, 94, 101; 69 F. Supp. 409, 411, 415 (1947).

reviewed the entire law of delays and concluded that the Supreme Court would not excuse wilful delays or those caused not in the exercise of a reserved right.[46] Weighing the Government's actions, he found a lack of diligence and granted recovery for delay costs.

Diligence or fault was then to be the test,[47] at least in the absence of an express warranty on the part of the Government that the material would be delivered on time.[48] The Court of Claims has gone both ways in finding diligence or a lack of it. In cases where there is no evidence to establish a "lack of diligence" [49] or where the evidence affirmatively shows the Government "exerted every effort," [50] recovery is denied. On the other hand, where the court finds "negligence" [51] or "inexcusable" [52] actions, recovery is granted under a breach theory.

It is difficult to ascertain any definite trend in the decisions as illustrated by the 1961 case of *Ozark Dam Constructors v. United States*.[53] There, without warranting a specific delivery date, the Government promised to furnish cement for a dam. The Government planned to use a certain railroad, but a strike occurred delaying delivery. At a preliminary hearing the Government moved to dismiss on the basis of a clause expressly denying liability. The court denied the motion, stating that the strike was clearly foreseeable and that the Government's failure to secure alternative transport was almost "wilful negligence." [54] But when the case was heard on the merits, the court reversed its opinion.

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[46] He was convinced that the Supreme Court would never deny recovery in a case like *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 284, 63 F. Supp. 653 (1946), where the Government's architect went on a three month's European vacation while the contractor waited for promised models.

[47] The Court of Claims has actually cited *Foley* as establishing the test of diligence. See Chandler v. United States, 127 Ct. Cl. 557, 563, 119 F. Supp. 186, 190 (1954). As we have seen, the court mentioned only in passing the degree of the Government's efforts.

[48] See Torres v. United States, 126 Ct. Cl. 76, 112 F. Supp. 363 (1953), where the contractor had provided a $26,781.00 contingency fund for late delivery of Government-furnished property. At the Government's urging, he eliminated this item from his bid, but the Government still didn't deliver on time. The court held that the Government's actions amounted to a warranty of timely delivery.

[49] See *e.g.*, Daum v. United States, 120 Ct. Cl. 192, 221 (1951).

[50] See, *e.g.*, Otis Williams & Co. v. United States, 120 Ct. Cl. 249, 273, 274 (1951).

[51] See, *e.g.*, Thompson v. United States, 130 Ct. Cl. 1, 124 F. Supp. 645 (1954).

[52] See, *e.g.*, Peter Kiewitt Sons Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 117 (1957).

[53] Ct. Cl. No. 143–54 (April 7, 1961), 288 F.2d 913 (1961).

[54] Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 112 F. Supp. 363 (1955).

They examined what both the contractor and the Government had done to secure another means of transport and concluded that Government negligence had not been proved.[55]

D. *DELAYS CAUSED BY SOVEREIGN ACTS*

No discussion of Government-caused delays would be complete without at least brief reference to delays caused by the Government in its sovereign, rather than contractual, capacity. A full treatment of the doctrine of sovereign immunity as applied to the law of contracts is, of course, beyond the scope of this paper.

In one of its first reported cases, *Jones v. United States*,[56] the Court of Claims was faced with the problem of interference with the contractor by a governmental act unrelated to the contract itself. Two surveyors had contracted to complete a survey of certain Indian Territory. The Army officer in charge of the area in question ordered a withdrawal of Government troops, leaving the contractors unprotected and requiring postponement of the survey. The contractors then sued in the Court of Claims for the delay costs they had incurred. The court found that the act of removing the troops was a "sovereign act," that the Government would be liable only if another contractor (fictitiously placed in its stead) would be liable under the same circumstances, that another contractor would not be liable under these circumstances, so, too, the Government could not be liable. The holding in the *Jones* case, "that the United States as a contractor cannot be held liable directly or indirectly for the public acts of the United States as a sovereign" was specifically approved by the Supreme Court in *Horowitz v. United States* [57] and stands as the law today.

World War II furnished at least one example [58] of the application of the rule. Shortly after Pearl Harbor a contractor in the Panama Canal Zone was delayed to his detriment by the Government's actions in diverting promised work and materials to projects of higher priority. In denying the contractor's claim for delay costs, Judge Madden of the Court of Claims wrote:

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[55] Two judges dissented. They felt the majority opinion was "premised on what the plaintiffs did not do, rather than the omissions of the defendant." Some of the evidence used to support the finding of diligence does seem thin. Included were the Government's "hopeful" belief that the long threatened strike would not occur, their anticipation that the strike, if started, would be so serious that it would be settled soon, and "licensing" problems which might arise if the cement was delivered by truck.

[56] 1 Ct. Cl. 383, 384 (1865).

[57] 267 U.S. 458 (1925).

[58] See Froemming Bros. v. United States, 108 Ct. Cl. 193, 70 F. Supp. 126 (1947).

> If the contract interfered with were between private contractors, and the interposition of a Government priority order or military regulation delayed performance, the contractor who was hurt by the delay could not, of course, claim compensation from the other party to the contract, and would have to bear his own loss. There seems to us no reason why a contractor, whose contract happens to be with the Government, should be in a more favored position . . . .[59]

Later we will have occasion to discuss some of the difficulties in applying this rule to the continually changing conditions of the cold war.

E. *SOME COMMENTS ON THE LAW*

With this background on the law of delays, certain comments appear appropriate:

1. It seems reasonable to conclude, as the courts have, that by reserving the right to make changes the Government also reserves the right to delay, at least for a reasonable time. There is, of course, a contrary argument. The contract itself makes no mention of any right to delay, so the right must be implied. A given contractor might well question that he has sold (or even contemplated) the right to delay; this was the position of the contractor in *Chouteau.* Yet, in the normal case, some delay will flow from a change. The right to make changes would be of little value if it could be exercised only when the change would cause no delay. The courts, therefore, appear justified in holding that the parties contemplated the sale of the right to delay as part of the right to make changes.

The quarrel here is not so much with the interpretation of the Government's rights as it is with the contractor's entitlement. While the courts have given broad interpretation to the Government's rights under the Changes clause, they have been niggardly in interpreting those of the contractor. That a change will be followed by a price adjustment is the consideration for the granting of the privilege. Few contractors, indeed, would agree to inclusion of a Changes clause without this provision, and, if it were not included, the courts would no doubt imply it. But the Supreme Court, in *Rice,* has narrowly restricted the scope of the price adjustment to increases in the cost of changed work, and nothing is permitted for stand-by costs or increases in the cost of unchanged work.

The court gives two reasons for this restriction. First, it says the language of the equitable adjustment feature contemplates

[59] *Id.* at 212; 70 F. Supp. at 127.

only increases in the cost of changed work; *Chouteau* is usually cited as authority for this proposition. However, there is nothing in the clause in that case which would restrict recovery to changed work. The contract simply provided that the contractor would be reimbursed for any "extra expense" he might occasion as a result of changes. Why should not delay costs be considered an "extra expense"? Certainly McCord, who went bankrupt, considered them as such. In fact, it seems more reasonable to include such costs than exclude them. The Courts, in *Chouteau*, gave no reasons for denying delay costs as part of the "extra expense" adjustment. There is only the simple statement, unaccompanied by any analysis, that the contract provided nothing for unchanged work.

The answer may lie in the way the plaintiff presented his case. He contended the Government had breached, not that he was entitled to relief under the clause itself. So the court was never squarely presented with the issue of what should be included as "extra expense." The principal holding of the case—that the Government had not breached—is not questioned. There are good and sufficient reasons for keeping a war contractor on the job. It is, however, suggested that *Chouteau* should never have achieved the importance that it did in determining the contractor's entitlement, and that delay costs could easily have been permitted under the Changes clause.

The second reason the court gives for denying delay costs under the Changes clause is that the contractor is already "compensated" for the delay by an extension of time under the Delays-Damages clause, and that this is his sole remedy. Strangely, this view seemed "wholly reasonable" to Justice Black. The Court of Claims has not agreed, and they are surely joined by the business community. The concept conflicts with common sense as well as the old adage that "time is money."

The fact is that the Delays-Damages clause was never intended as the contractor's sole remedy for delay. The extension of time provided for by the clause was intended only to relieve the contractor from paying liquidated damages when he was delayed through causes beyond his control. The Delays-Damages clause has no place in considering the contractor's entitlement to financial reimbursement for Government-caused delay and the courts would do well to eliminate it from their consideration of the problem.

2. There are really two problems involved in site availability. One relates to delay in initially getting the site ready for the contractor. The other relates to keeping it available as the work progresses. According to *Crook, Rice* and the majority in *Foley,*

the Government is liable in either instance only if it has made an unqualified warranty of readiness. Neither the contract performance schedule nor the "notice to proceed" constitute such a warranty. Time in a Government contract is said to be "provisional", which may come as a surprise to the contractor, who is held for liquidated damages if he inexcusably exceeds the number of days allotted him.

The court arrives at this conclusion by looking to the Changes clause, and reasons that if delays through changes are expected, then the completion date must be only "tentative." This reasoning is open to question, as the matter of changes seems quite collateral to that of site availability. Surely, it is not inconsistent for a contractor to know full well he may be delayed by a change but never anticipated a delay in starting work. Yet, this is what the court seems to be saying. However, the real difficulty lies in that fact that the court has placed no limits on the "provisional" rule. Is the Government under no duty at all? Could it delay for five years without breaching?

The minority in *Foley* suggested a partial answer by making the "notice to proceed" a warranty. Under this theory the Government would assume all risks after the notice is issued. This would, of course, completely indemnify contractors who are delayed while the work is in progress, but it would provide nothing for those to whom no "notice to proceed" is issued. It might also be unfair to the Government which could argue it had never bargained away possible defenses of impossibility.

A better answer seems to lie in an examination of what the parties contemplated at the time they made the bargain. This would show quite clearly that the Government and the contractor contemplated that the site would be available and the notice issued within a reasonable time. It would also probably show that subsequent Government-caused delays (unrelated to changes) were not contemplated at all. If the Government were then charged with a duty (not a warranty) to make the site available within a reasonable time and to cause no delays thereafter, its failures could be judged under the normal rules for discharge by impossibility.[60] As in any case where the contract is silent as to which party is assuming what risks, the court would distribute the risks between the parties in accordance with justice and normal business practice. For example, the contractor would not

[60] See generally 6 CORBIN, CONTRACTS §§ 1320–32 (1962).

have to bear the risk of the Government's negligence,[61] and possibly the Government would not bear the risk of an act of God.[62]

However, the Supreme Court's failure to imply any duty on the Government prevents any distribution of the risks. They are, as we have seen, all on the contractor.

3. When delay is caused by a failure to deliver promised material, the Court of Claims has been able to imply more duties on the part of the Government. In the absence of a specific delivery schedule, the court requires the Government to deliver in time for economical use. They do not, however, convert the Government's promise into a warranty or promise to indemnify, and the Government is left with the usual defense of impossibility.

Impossibility may be objective (where performance is factually impossible) or subjective (where the inability is peculiar to the promisor). Whereas objective impossibility acts as a defense, subjective impossibility does not.[63] The scope of objective possibility has been expanded in recent years, but there are limits to its application.[64] The Court of Claims has been liberal in interpreting what is objectively impossible for the Government. Cases like *Ozark Dam* have definite subjective overtones and even the burden of coming forward with the evidence, which should be on the Government,[65] seems confused.

The Court of Claims also seems preoccupied with the question of diligence, which should be the last issue resolved. If the Government promises to deliver cement and does not do so, it should first prove delivery was objectively impossible. When this is done the contractor may attempt to prove that the impossibility was brought about by the Government's lack of diligence and that therefore the Government should not be released. In reply the Government may prove it was in fact diligent, but the issue should arise only after the Government has proved impossibility and the contractor has raised the question of diligence. Of course, diligence has a bearing on impossibility. But, if an objective standard is to be applied, the issue should be: Was it reasonably possible for anyone to do this? Not, did the Government's agents put in a full day's work? In a few cases this has resulted in emphasis on what the Government did, rather than what it could have done.

It seems clear, however, that the risks have been more fairly

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[61] See *id.* § 1329.
[62] See *id.* § 1324.
[63] See *id.* § 1325.
[64] See *id.* § 1333.
[65] See *id.* § 1329.

allocated in this area than in that of site availability. The Supreme Court has not been directly faced with the problem. Whether they would adopt the *Foley* rationale and bar recovery in the absence of an unqualified warranty or change the trend and imply some duty on the part of the Government is speculative.

4. The defense of sovereign immunity, under which all risks are allocated to the contractor, is certain to present increasing problems in the cold war. The old analogy of fictitiously placing a private contractor in the Government's place to determine liability becomes strained in some modern settings. For example, what of the risks run by a contractor at an air field or missile site who is subject to frequent and largely unforeseeable interruptions by alerts, each a sovereign act. Is it in the best interests of the United States to distribute all risks to him?

5. Viewing the entire problem of Government-caused delays from the point of view of an allocation of risks, the scale is heavily balanced against the contractor. When changes are ordered he must bear the risk of "reasonable" delays. When the site is not available he must bear all risks. When promised material is not delivered, he must bear the risk of impossibility. When the sovereign interrupts, he must again bear all risks.

Because these various risks are allocated by the courts, rather than the contract, confusion exists on the part of the contractor as to what risks he is assuming. As Professor Corbin has written: "It makes little difference to the community which party must bear the risk; but it makes mush difference that we know in advance which one must bear it." [66] Surely, this is what happened in *Chouteau, Rice* and *Foley*. There was nothing in these contracts to indicate the contractor was assuming the risk of Government-caused delay. If anything, a contrary inference seemed more reasonable. Inequities are bound to result in such a situation. These three contractors were apparently honest and prudent businessmen. Two went bankrupt and the third sustained heavy losses, not because they gambled and lost, but because they did not know they were gambling at all.

We may assume, however, that present day contractors are aware of the risk of Government-caused delay. Substantial coverage has been given to the subject in trade journals and newsletters.[67] With this knowledge, the contractor's only problem is

[66] See *id.* § 1328.

[67] See, *e.g.*, The Constructor Magazine, Oct. 1962, p. 27 (This is the "Official Journal" of the Associated General Contractors); 3 The Government Contractor, para. 560 (1961) (a newsletter designed to keep contractors abreast of federal contract law).

computing the odds and having the Government put up its portion of the wager as part of the contract price. Unfortunately, the courts have provided no guidance as to how the contractor should estimate the cost of this risk.

The task of evaluating the possible effects of Government-caused delay is not easy, and a number of factors not involved in the usual commercial contract are present: What is the likelihood of changes? How much delay might result? How will unchanged work be affected? What if the Government does not have the site ready? What if they are late in delivery of promised material? What is the possibility of sovereign acts? How will the court interpret such concepts as "reasonableness" and "diligence"? These are just a few of the factors which must be considered.

The only solution for the contractor seems to be to arrive at the minimum contingency consistent with maintaining a competitive posture. He will realize, of course, that this cannot protect him from a catastrophic delay, but perhaps it will cover those of a less serious nature. Possibly, over a period of time, he can provide for the ups and downs of delay costs and thereby protect himself. In any case, he will not have taken a risk without compensation.

6. The foregoing are some of the problems presented by the judicial treatment of Government-caused delays. The Supreme Court, in particular, has been unwilling to imply duties or allocate risks to the Government. They have not, however, told the Government how it should contract. The language of *Rice* is clear: "If there are rights to recover damages where the Government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties." [68]

If the law cannot be clarified, perhaps the contracts can. Fortunately, some Government agencies have adopted standard contract clauses which better define the rights of the parties, at least in some areas. However, in other agencies and other areas, there is great room for improvement and clarification. In the next section we shall discuss some of the present contract clauses and their impact on delay costs.

III. THE CONTRACT CLAUSES

A. *THE ROLE OF THE ADMINISTRATIVE BOARDS*

Any study of the impact of Government contract clauses must

[68] United States v. Rice, 317 U.S. 61, 66 (1942).

necessarily concern itself with the agencies which interpret these clauses. We have already examined the judicial treatment given some of the clauses by the Supreme Court and the Court of Claims—these courts establish the law. However, the everyday business of determining proper application of the clauses is more likely to be found in the administrative boards which have been established to settle contract disputes administratively. A full description of the nature and function of these boards is beyond the scope of this paper,[69] but a few observations appear appropriate.

It is generally recognized that boards, such as the Armed Services Board of Contract Appeals[70] [hereafter referred to as the "ASBCA" or "the Board"], offer a speedy and relatively inexpensive method for resolving contract disputes.[71] While decisions of ASBCA are not final on questions of law,[72] the Board is nevertheless forced to decide such questions, when mixed with questions of fact. The Board's jurisdiction is, however, limited. It has no authority to rescind or reform a contract or award damages.[73] This last proviso has particular significance in the area of delay costs, for the ASBCA has consistently ruled that, unless there is a contract clause giving the contractor the right to an equitable adjustment in price because of Government-caused delays, it has no jurisdiction to grant relief.[74]

The importance of decisions by administrative boards cannot be overestimated. For many contractors, an appeal to the Board on a mixed question of law and fact is the only practical remedy—time and expense factors preclude further appeals to the courts.

B. *DECLINE IN THE USE OF EXCULPATORY CLAUSES*

Before examining some of the current contract clauses which broaden the Government's liability for delay, it should be noted

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[69] See generally Cuneo, *Armed Services Board of Contract Appeals: Tyrant or Impartial Tribunal?* 39 A.B.A.J. 373 (1953).

[70] Currently authorized by Department of Defense Directive No. 5154.17 (March 20, 1962).

[71] In fiscal years 1957 and 1958 the ASBCA disposed of 1,421 cases in an average time of 10.5 months per case. During this same period the Court of Claims disposed of 464 cases. Time requirements for the Court of Claims are not kept, but a 1947–1948 study showed it took approximately three years from filing to judgment. Edwards, The Armed Services Board of Contract Appeals: An Assessment, Feb. 1959 (unpublished thesis in The Judge Advocate General's School, U.S. Army Charlottesville, Virginia.

[72] 68 Stat. 81 (1954), 41 U.S.C. §§ 321–22 (1958).

[73] Starck Van Lines, Inc., ASBCA No. 4647 (Dec. 16, 1958), 58–2 BCA 2036.

[74] Hugh G. Strickland, Inc., ASBCA No. 7702 (Feb. 19, 1962), 1962 BCA 3310.

that increasing the Government's responsibility is not the only solution to the problem. An express denial of liability for delay is another approach. Exculpatory clauses which did just this were once favored. Thus, in *Wells Bros. Co. v. United States*,[75] the contract read:

> [T]he United States shall have the right of suspending the whole or any part of the work . . . and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay . . . . Provided further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States.

The Supreme Court found this a "plain and unrestricted covenant" which barred delay claims.[76]

Those in charge of Government contracting were not unaware of the court's decisions in *Wells* and like cases, and the reaction was not favorable. Among agencies concerned was the Interdepartmental Board of Contracts and Adjustments.[77] This Board had been created by direction of the President in November 1922. Its primary functions were to standardize forms and methods of Government contracting, to recommend appropriate changes and to eliminate "those uncertainties of construction and hazards which have hitherto operated to increase the cost of Government work and supplies." [78] The Board operated until 1933 when it was dissolved by Executive Order.

The minutes of July 30, 1926 reflect the Board's attitude on exculpatory clauses:

> Major Cushing stated this [a clause giving the right to suspend without liability for delay damages] was a very unfair provision and ought not to be incorporated in the standard form as it was a hazard that would add materially to the price of the bids in every instance, although the right would seldom be exercised by the Government . . . . No action was taken to insert such a provision in the standard form . . . .[79]

The Board's rejection of an exculpatory clause in the standard form did not solve the problem. The minutes of November 18,

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[75] 254 U.S. 83, 87 (1920).

[76] Justice Clarke, whose unfriendly attitude toward contractors we have seen, p. 7 *supra*, wrote this decision. But there are indications that Justice Holmes shared his feelings. In *H. E. Crook Co.* v. *United States*, 270 U.S. 4 (1926), which contained no exculpatory clause, Holmes referred to a case in which the Government had expressly denied liability and observed that "in some cases the Government's lawyers have been more careful."

[77] All information concerning the Inter-departmental Board, including origin, minutes and letters, has been derived from Harwood-Nebel Constr. Co. v. United States, 105 Ct. Cl. 116 (1945).

[78] See *id.* at 129.

[79] See *id.* at 132.

1932 reflect concern that some Executive Departments were still using exculpatory clauses. New interest was kindled in amending the standard form to eliminate these clauses once and for all. But after much discussion, the idea of a standard clause was discarded in favor of a Board letter to the heads of the various executive departments. This letter related in part:

> It is evident that the incorporation in the specifications of provisions reserving to the Government the right to suspend the work without compensation to the contractor tends to increase the cost of the work. Therefore, such a provision should be used only in the exceptional cases where conditions fully justify it.[80]

Notwithstanding official criticism of exculpatory clauses, their use, at least by some agencies of the Government, continued through World War II. As recent as 1953 the Court of Claims held that such a clause would relieve the Government of liability for delays: "Although the provision is harsh, we are not at liberty to narrow the construction of it in order to alleviate its harshness." [81] However, in 1955, in *Ozark Dam Constructors* v. *United States*,[82] the Court of Claims took a different view of the clause. Judge Madden had the following general observations:

> A contract for immunity from the harmful consequences of one's own negligence always presents a serious question of public policy. That question seems to us to be particularly serious when, as in this case, if the Government got such immunity, it bought it by requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine. If it does, by such a provision in the contract, get the coveted privilege it will win an occasional battle, but lose the war.

The opinion concludes that the non-liability provision, "when fairly interpreted in the light of public policy," could not provide the Government with immunity from delay claims.

It would be a mistake to assume that exculpatory clauses will never again be found in a Government contract, but the trend is definitely away from using such clauses. Generally, current clauses broaden the Government's liability. We shall now examine five clauses, presently being used, to determine their impact on the Government's responsibility for delay.

1. *The Changes Clause*

Since the Civil War the Changes clause has been responsible

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[80] See *id.* at 156.

[81] George J. Grant Constr. Co. v. United States, 124 Ct. Cl. 202, 109 F. Supp. 245 (1953).

[82] 130 Ct. Cl. 354, 360, 127 F. Supp. 187, 191 (1955).

for most Government-caused delay. This clause is now required in all Government contracts, and the full provisions of current clauses are set forth in Appendix A. The principle behind the Changes clause remains the same. The Government has the right to change the work and the contractor has the right to an equitable adjustment in price. Thus, in supply contracts[83] an adjustment will be made if changes are made in plans, method of shipment or place of delivery. In construction contracts[84] an adjustment will be made if changes are made in plans or if unexpected subsurface conditions are encountered which materially differ from those indicated in the contract.

The Supreme Court, in its decisions in *Rice* and *Chouteau*, has presented a formidable barrier to the recovery of delay costs as part of an equitable adjustment under the Changes clause. They have allowed recovery only for changed work, and barred recovery for both stand-by costs and increased price of unchanged work.

Those who have not agreed with the Supreme Court's position (including the contractors) have made repeated attempts to use the Changes clause as a vehicle to recover delay costs. These attempts have taken two forms: First, contractors have tried to convince the ASBCA that delays are in fact changes, and that unreasonable delays related to changes are properly compensable under the clause. The Board has not been convinced. Second, there have been attempts to revise the clause itself. These have met with partial success in the supply field.

a. Delays Are Not Changes. Undoubtedly it has come as a surprise to many a contractor to learn that when the Government stops his work it has not changed the contract within the meaning of the Changes clause. Yet, with a few exceptions, this is the position the Board has taken.[85]

The appeal of *Simmel-Industrie Maccaniche S.A.*[86] shows the present position of the Board. This Italian firm had contracted to make high explosive shells for the Air Force. The contract called for an initial "pilot lot" which was to be promptly inspected

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[83] See Federal Procurement Regulations § 1-7.101-2 (Sept. 17, 1959) (mandatory clause) (hereinafter cited as F.P.R.).

[84] See F.P.R. § 1-16.901-23A (Jan. 14, 1961) (mandatory clause).

[85] See Model Eng'r. & Mfg. Corp., ASBCA No. 7490 (April 20, 1962), 1962 BCA 3363, and cases cited therein.

[86] ASBCA No. 6141 (Jan. 24, 1961), 61-1 BCA 2917.

by the Government before quantity production was started. The Government took six months to inspect the pilot lot and notify the contractor that his work was satisfactory. In the meantime, the contractor's production lines were idle and delay costs mounted. The Board held that the equitable adjustment provisions of the Changes clause could not be used as a vehicle for recovery of delay costs related to unchanged work. They cited their holding in *Laburnum Construction Corp.*,[87] which in turn had been based on *Rice* and *Chouteau.*

One member of the Board dissented. He felt that it was inconsistent to grant an equitable adjustment for acceleration of work —which the Board had done[88]—but deny it for delay. He also pointed to prior cases where the Board had reached a contrary conclusion.[89]

The dissent in *Simmel* has a logical appeal. Perhaps the only distinction between acceleration and delay is that in the former, time is directly involved (and the parties have, in effect, a new contract), whereas in the latter, time is only an indirect consequence (and there is no new contract). In any event, no one could question that the majority's view was in keeping with the law as laid down by the Supreme Court. Procurement attorneys have criticized the case[90] and urged the Board to change its position. However, the Board has stood firm and now describes *Simmel* as "ingrained" in its precedent.[91]

The delay in *Simmel* did not stem from change orders, but the contractor is in no better position if the delay is directly connected to an actual change. Following the Court of Claims, the Board has held that the Government is entitled to a reasonable amount of "free time" in making a change. No equitable adjustment is due for this reasonable time. If the Government exceeds the reasonable period, it has breached the contract and conceivably the contractor can recover damages in the courts. But the ASBCA

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[87] ASBCA No. 5525 (Aug. 10, 1959), 59–2 BCA 2309.

[88] See Farnsworth & Chambers Co., ASBCA No. 4945 (Nov. 24, 1959), 59–2 BCA 2433.

[89] See, *e.g.*, Todd Shipyards Corp., ASBCA No. 649 (Sept. 28, 1951); Schaefer & Co., ASBCA No. 917 (Jan. 31, 1952). There is no way of reconciling these cases with the Board's present position. Apparently they must be put down as early exceptions made before the current rule had solidified.

[90] Gilbert Cuneo, an experienced procurement attorney and former member of the Board, calls the failure to include delays as changes "horse-and-buggy thinking as an instrument for solving space-age problems." 3 The Government Contractor, para. 560 (1961).

[91] See Model Eng'r. & Mfg. Corp., ASBCA No. 7490 (April 20, 1962), 1962 BCA 3363.

holds that it has no jurisdiction to award damages and that the Changes clause does not cover unreasonable delays.[92]

It appears, then, that a contractor could never recover the costs of delay, whether reasonable or unreasonable, under the Changes clause. A single exception to this rule will be discussed next.

b. Changes in the Changes Clause. In October 1957 the General Services Administration issued a new standard form for supply contracts containing an important revision in the Changes clause. Previous editions of the form had allowed an equitable adjustment in price if the change order caused an increase (or decrease) in "the costs of, or the time required for, performance of this contract . . . ." [93] The new Changes clause provided an equitable adjustment in price if the change order affected the cost "of any part of the work under this contract, *whether changed or not changed* by any such order . . . ."[94] (emphasis added).

The former provision had, of course, been interpreted to deny an equitable adjustment for unchanged work. The new provision expressly permitted recovery for unchanged work. Thus, by the addition of five words to a standard clause, the Government had rendered moot almost one-hundred years of law, at least insofar as supply contracts were concerned.

The first concrete steps to secure this amendment to the standard clause had been taken by the Armed Services Procurement Regulations Committee.[95] In January 1956 the *Rice* and *Chouteau* cases had been discussed with a view to determining whether these holdings were "fair" to the contractor.[96] A subcommittee was appointed which rendered its report in April 1956.[97] This showed that in "all departments" contracting officers were "frequently" allowing equitable adjustments for unchanged work, notwithstanding the Supreme Court's injunction against such payment. In the subcommittee's view, "equity" required an adjustment for both unchanged work and stand-by costs. They recommended supply and construction contracts be amended to permit this.

There were objections to this proposal. First, it was argued that a promise to pay for unchanged work would not result in savings to the Government, for (a) price revisions would always

[92] See Norair Eng'r. Corp., ASBCA 3527 (April 16, 1957), 57–1 BCA 1283 and numerous cases cited therein.

[93] Standard Form 32 (Nov. 1959 ed.).

[94] Standard Form 32 (Apr. 1961 ed.).

[95] Hereafter referred to as the "ASPR Committee." The principal duties of this Department of Defense Committee are to draft provisions and formulate policy for inclusion in ASPR.

[96] See ASPR Committee Minutes (Jan. 4, 1956).

[97] See ASPR Committee Minutes (April 20, 1956).

be upward as the contractor had all of the proof, (b) delay contingencies were not contained in a separate item which could be eliminated from bids, and (c) contractors would not attempt to economize if they knew they would be reimbursed anyway. Second, it was argued that nonpayment for unchanged work was really equitable for (a) the courts had specifically approved the practice, and (b) bidding had never been more spirited.[98]

The opponents also believed that payment for unchanged work had no place in a construction contract. Supply and construction contracts, it was said, were not at all analogous. In construction, frequent changes could be expected, the work was less precise and much of it was performed outside, all of which increased risk. The contrary was true in supply contracts where changed work was usually separable.[99]

In September 1956, the committee reached a conclusion. They recommended amendment of supply contracts but not of construction contracts.[100] The proposal was then staffed at the General Services Administration and incorporated in the standard form supply contract.

The new supply contract changes clause has not yet been interpreted by the ASBCA or the courts. However, the Interior Board of Contract Appeals has decided one case involving it, and it has been the subject of an opinion by the Comptroller General.

The Interior Board was faced with the problem of delay prior to the issuance of a change order for which the contractor was claiming stand-by costs. They held that the new provision was not intended to cover stand-by costs, but only increases in the cost of actual work, changed or unchanged. The Board looked to the ASPR Committee Minutes, which they felt showed an intention only to overcome *Rice* and *Chouteau,* neither of which involved stand-by costs.[101]

This interpretation of the new provision would deny a contractor recovery for his most important delay cost, idle time awaiting a change order. It is suggested that a careful review of the ASPR Committee Minutes would show that the committee was well aware of the difference between stand-by costs and increases in the cost of unchanged work, and that they felt equity required compensation for both. However, because the new clause does not expressly include stand-by costs, the ASBCA and the courts may well follow the Interior Board.

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98 See ASPR Committee Minutes (June 6, 1956).
99 See ASPR Committee Minutes (Sept. 25, 1956).
100 See *ibid.*
101 See Weldfab, Inc., IBCA No. 268 (Aug. 11, 1961), 61–2 BCA 3121.

The Comptroller General's decision [102] stems from a peculiar case where, apparently by mistake, a supply contract form was used for construction work. The contractor was delayed for the convenience of the Government but not in connection with a change. In denying an equitable adjustment, it was said:

> However, the inclusion of the referred-to phrase ['whether or not changed'] in the new clause in no way eliminates the condition inherent in the first part thereof that a 'change' of a kind provided for in the clause . . . must have taken place in order to entitle the contractor to an equitable adjustment with respect to any type of costs incurred as a result thereof.[103]

This places the contractor in the peculiar position of being the advocate of the change. If he is stopped pending a proposed change which never materializes, he is out of luck. But if a change is actually made, no matter how small, he will at least recover the increased costs of the unchanged work.

The foregoing analysis illustrates the difficulties inherent in any attempt to broaden the scope of the Changes clause to include delay costs. The ominous shadows of *Rice* and *Chouteau* are ever present. Even the new supply contract clause seems doomed to a narrow interpretation. We shall now consider a standard clause which has met with more success from the contractor's viewpoint.

2. *The Suspension of Work Clause in Construction Contracts*

On January 20, 1960, the General Services Administration issued a new standard contract clause for construction contracts. The clause was elaborately entitled "Price Adjustment for Suspension, Delay, or Interruption of the Work," [104] and the full provisions are set forth in Appendix B.

The new clause incorporates a number of features. First, it gives the Contracting Officer the right to suspend work for as long as he deems appropriate. Second, it gives the contractor a right to a cost adjustment if he is delayed unreasonably by an act or failure of the Contracting Officer (regardless of whether a formal suspension order has been issued by the Contracting Officer). Third, it denies recovery if: (a) other causes would have delayed the contractor anyway, (b) the contractor has been at fault or negligent, (c) the contractor has not notified the Contracting Officer of the fact of delay, and (d) the contractor has not filed his claim as soon as practicable.

To the disappointment of many, including the drafting commit-

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102 41 DECS. COMP. GEN. 436 (1962).
103 *Ibid.*
104 F.P.R. Circular No. 5 (Jan. 20, 1960), 25 Fed. Reg. 648 (1960).

tee, the implementing instructions did not prescribe mandatory use of the clause. Instead, the clause was issued as one of the "Additional standardized clauses" [105] which was to be inserted whenever it was "desired to provide for suspension of the work for the convenience of the Government and/or to provide for administrative relief for unreasonable periods of delay caused by the Contracting Officer in the administration of the contract." [106] It was, therefore, standardized only in the sense that all Government agencies using a suspension clause had to use this one.[107] The Department of Defense published the clause in the Armed Services Procurement Regulations and prescribed its use on an optional basis for fixed price construction contracts.[108] The Army Corps of Engineers required the clause in all contracts;[109] the Navy required it in all contracts over $25,000;[110] the Air Force did not issue implementing regulations.

The idea of a contract clause to provide for price adjustments when the Government delayed construction work was not new. The Army had been using a Suspension of Work clause, the familiar "GC–11," since World War II,[111] and a slightly modified version of this same clause had appeared occasionally in Air Force contracts.[112] In 1950, a Government-wide effort to draft a standard suspension clause failed,[113] as did a 1953 attempt by the Associated

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105 F.P.R. § 1–7.602 (Jan. 20, 1960).

106 F.P.R. § 1–7.602–1 (Jan. 20, 1960).

107 The office of Procurement Supply located in the General Services Administration is responsible "for developing and executing a continuing Government-wide program for the establishment of uniform procurement policies and procedures." GSA Circular 202 (Feb. 12, 1960). Standard forms prescribed by this office must be used by all Government agencies including the Department of Defense. F.P.R. § 1–1.004 (March 17, 1959).

108 ASPR, Revision No. 12, para. 7–604.3 (Nov. 26, 1962).

109 Engineer Reg. 1180–1–1, para. 7–602.70 (1962).

110 BUDOCKS Notice No. 4330 (April 21, 1960).

111 The usual text of this clause is set forth in note 121 *infra*. Research did not disclose its exact genesis, but the Armed Services Board of Contract Appeals referred to the history of the clause in *T. C. Bateson Constr. Co.*, ASBCA No. 5492 (March 16, 1960), 60–1 BCA 2552. Interestingly, both appellant's and Government counsel had been attorneys for the Corps of Engineers during the war and had participated in drafting the original clause. The Board found the clause was in part the outgrowth of agitation over the Supreme Court's decision in *United States v. Rice*, 317 U.S. 61 (1942), and urgings by the Associated General Contractors to overcome the harsh results of this case.

112 *E.g.*, Jack Clark, ASBCA No. 3672 (Aug. 15, 1957), 57–2 BCA 1402 (clause expressly inapplicable where delay caused by changes).

113 This was the so-called "Castella Committee," a subcommittee of the Federal Standard Contract Committee established by Circular Letter B–39, Procurement Division, Department of the Treasury (June 14, 1946). The subcommittee was chaired by Mr. Charles C. Castella.

General Contractors to have such a clause included in the ASPR.[114] But in 1955, the Navy revived interest and recommended the adoption of a suspension clause to the ASPR Committee.[115] That same year Admiral R. J. Perry, then Chief of the Bureau of Docks and Yards, publicly announced his support of the clause before a meeting of the Associated General Contractors.[116] Though the Air Force opposed the clause, the consensus of the ASPR Committee was favorable.[117] However, no action was taken to include the clause in the Armed Services Procurement Regulations, and the matter was, in effect, turned over to a Government Task Force which had been established to unify Government procurement procedures. The Task Force, in turn, referred the matter to a Study Group for recommendations.[118]

On April 30, 1958, the Study Group rendered its report.[119] It had taken testimony and secured evidence and opinions from numerous Government agencies, The American and District of Columbia Bar Associations and the Associated General Contractors. There had been almost universal endorsement of the proposed clause. In what the chairman termed a "spectacular reversal in policy attitude," the Group recommended a suspension clause, similar to that finally issued, for mandatory use throughout the Government. These recommendations were then staffed through forty different Government agencies. Changes in wording were made and, because of objections from some agencies, the mandatory idea was dropped in favor of optional use.[120]

The new clause is strikingly similar to the old "GC–11" Suspension of Work clause used by the Corps of Engineers and set forth

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[114] Referred to in ASPR Committee Minutes (Jan. 11, 1955).

[115] ASPR Committee Minutes (Jan. 11, 1955).

[116] Admiral Perry concluded that the risk of Government-caused delay was one which "we in the Government are obliged to eliminate." Quoted in BUDOCKS Notice No. 4330 (April 21, 1960). He did not explain why the Navy had not included the clause on its own volition as the Corps of Engineers had done for years.

[117] ASPR Committee Minutes (Aug. 2, 1955). Legality was one of the objections made by the Air Force. However, the Comptroller General disposed of the question when he interposed no objection to suspension clauses proposed by both the Department of Defense, 36 DECS. COMP. GEN. 302 (1956), and the Department of the Interior, *Ms. Comp. Gen.* B–127743 (Nov. 5, 1956).

[118] See Memorandum from the Task Force Chairman to Chairman, Study Group 15 (Oct. 10, 1957), GSA File I–A–3, No. 24.

[119] Final Report of Study Group No. 15—"Suspension of Work" clauses in Construction Contracts (April 30, 1958), GSA File I–A–3, No. 24. Paul H. Gantt, an attorney for the Department of the Interior, was the Chairman of Study Group No. 15. He had long been interested in a uniform suspension clause and in 1954 had written an article urging its adoption, Gantt, *Selected Government Contract Problems*, 14 FED. B. J. 397 (1954).

[120] See Memorandum by Task Force Chairman (Sept. 16, 1959), GSA File I–A–3, No. 24.

below.[121] The two differ only in that under the new clause, (a) an express, formal suspension order is not required, (b) delays not caused by the Government are expressly excluded, (c) profit is excluded, and (d) a delay notice by the contractor is required. The first two differences are more apparent than real. As we shall see, "GC–11" was interpreted to permit recovery in the absence of an express suspension order; it was also interpreted to deny recovery for delays not attributable to the Government. The last two differences, profit and a notice requirement, are not significant at this point.

We have, then, a suspension clause which has been in existence for almost twenty years and which has been interpreted on many occasions by the ASBCA. The new clause is too new to have been the subject of claims or litigation, but there can be no doubt that the Board will apply the new clause exactly the way it applied its predecessor, "GC–11."

"GC–11" was a potent clause which went to the very heart of the delay problem. However, it could never have achieved the importance it did if a 1948 Engineer Appeals Board had not determined it could be applied constructively. In the case of *Guerin Brothers*,[122] it was clear that the Government had suspended work for its own convenience. The Contracting Officer had not, however, issued a formal suspension order under "GC–11." In granting an equitable adjustment for delay, *nunc pro tunc*, the Board held that the controlling factor was not so much what the Contracting Officer had done, but what he *should* have done. The ASBCA has approved, applied and expanded the doctrine of constructive application.[123] The new clause, which requires no formal order, is, of course, based on this line of cases.

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[121] GC–11: "The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense or loss, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable extension of time for the completion of the work in the event of any suspension will be allowed the Contractor, provided however, that the suspension was not due to the fault or negligence of the Contractor."

[122] Eng. BCA No. 1551 (1948).

[123] John A. Johnson & Sons, Inc., ASBCA No. 4403 (Feb. 11, 1959), 59–1 BCA 2088.

In 1960 the Board set forth its views on what they believed "GC–11" was intended to accomplish:[124]

> [T]he "Suspension of Work" clause accomplishes two things: First, it repels any possible interpretation of the contract as making a time extension the contractor's exclusive remedy for delays caused by acts of the Government. Secondly, it provides an administrative remedy for settlement and payment of claims for losses and increased costs incurred by the contractor as a result of suspension of work or parts thereof, caused by the Government under certain circumstances.
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> * * * * * * *
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> Except for repelling any idea that a time extension is the contractor's exclusive remedy for a Government-caused delay, we are not aware of any right of recovery created by the 'Suspension of Work' clause that would not otherwise exist in an action at law for damages . . . . [it] *provides a contract administrative remedy without creating any new or additional substantive rights.* (Emphasis added).

We shall now examine some specific areas where the clause has been applied.

a. Failure To Have the Site Ready. Early in its existence, the Board was faced with a case where the Government had delayed a contractor by failing promptly to issue a notice to proceed.[125] It was held that the contractor was entitled to an equitable adjustment under the suspension clause, as the delay had been for the convenience of the Government. No mention was made of the Supreme Court's decisions in *Rice* and *Foley* which would seem to have barred recovery.

However, in the 1959 case of *John A. Johnson & Sons, Inc.*,[126] the Board took a more critical look at the clause. The contract called for the erection of mess halls, and a notice to proceed was promptly issued. However, unusually heavy rains prevented the contractor from getting started for 253 days. The Board denied an equitable adjustment for delay costs; first, because site availability had not been warranted (citing *Foley*); second, because the Government had not been at fault. The Board said:

> Our study leads us to the conclusion that the intendment of this clause was not to transfer to the Government all risks incident to delays, but was to provide a contractual basis for compensating a contractor for delays *caused by the Government in its contractual capacity* . . . . (Emphasis in original).

Seven months later in *Kraft Construction Co.*,[127] the Board re-

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[124] See T. C. Bateson Constr. Co., ASBCA No. 5492 (March 16, 1960), 60–1 BCA 2552.

[125] See Scott-Buttner Electric Co., ASBCA No. 1916 (May 3, 1954).

[126] ASBCA No. 4403 (Feb. 11, 1959), 59–1 BCA 2088.

[127] ASBCA No. 4976 (Sept. 15, 1959), 59–2 BCA 2347.

treated from this position. They held that while the usual contract might not warrant a site, there was an implied obligation to issue the notice to proceed (and have the site ready) within a "reasonable time." If the Government did not comply with this standard, an equitable adjustment was proper under the suspension clause. As authority for this proposition they cited the Court of Claims' 1940 decision in *Ross Engineering Co.*[128]

The difficulty with the *Ross* case is that it was decided before either *Rice* or *Foley*. All three cases had substantially the same contract clauses. Where the Court of Claims found an implied obligation, the Supreme Court found nothing. Even so, the Board continues to cite *Ross* for the test of reasonableness.[129]

Two 1960 appeals by the *T. C. Bateson Construction Co.*, arising from work on the Air Force Academy, show a more logical approach. In each a notice to proceed had been issued, but the contractor had been unable to get started because the grading contractor had not finished his work. Under the first contract,[130] recovery for delay costs was denied under the doctrine of *Foley* that the Government had not become a warrantor of availability. But in the second case,[131] the Government had expressly promised that the notice to proceed would be issued by a certain date. This, the Board said, amounted to a warranty that the site would be available by that date, and recovery under the suspension clause was granted.[132]

The 1961 appeal of the *Plant Supervision Corporation*[133] shows the extent to which the Board has pushed Government liability. The contract was for repair of a heating system in a hospital. The Government issued a notice to proceed on August 4, 1959, but the hospital could not be fully cleared until September 7th. The Board held that any delay after August 17th was unreasonable and permitted delay costs under the suspension clause.

b. Unforeseen Physical Conditions. As a general rule unforeseen physical conditions will not bring a suspension clause into play.[134] However, if the Government is at fault, recovery may be granted.

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[128] 92 Ct. Cl. 253 (1940).

[129] James Smyth Plumbing & Heating Co., ASBCA Nos. 6098 and 6632 (June 27, 1962), 1962 BCA 3420.

[130] ASBCA No. 6138 (Aug. 8, 1960), 60–2 BCA 2757.

[131] ASBCA No. 5985 (Aug. 30, 1960), 60–2 BCA 2767.

[132] The Board's reasoning is closely in line with the standard used by the Court of Claims in *Abbet Electric Corp.*, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958).

[133] ASBCA No. 6335 (March 23, 1961), 61–1 BCA 2940.

[134] John A. Johnson & Sons, Inc., ASBCA No. 4403 (Feb. 11, 1959), 59–1 BCA 2088.

Thus, in *Howard B. Nilsen*,[135] an equitable adjustment was made where delay resulted from the discovery of an underground cable not shown on Government plans.

An interesting case arose in 1956 which shows how far the Board will go in permitting recovery where the Government becomes entangled in weather factors.[136] The contract had no suspension clause. Despite this, the Contracting Officer ordered the work stopped when winter weather threatened to prolong the job and inconvenience Government operations. The contractor was told that price would be negotiated later. In the spring the contractor submitted his bill, only to be told that because the contract had no suspension clause he was entitled to nothing under the contract. The Board, in one of its more imaginative moments, held that the parties had really entered into a supplemental agreement containing a suspension clause. An equitable adjustment was, therefore, deemed proper.

c. Changes. Nowhere is the suspension clause more appropriately applied than in the area of changes. We have seen that the Court of Claims applies a test of reasonableness to the Government's reserved right to delay in making changes. The Board applies substantially the same test. In an early case, where the contractor was arbitrarily interrupted for 53 days while the Government experimented with possible changes, the Board held the entire period unreasonable.[137] Similarly, where the Government ordered a one-year stop because of the "possibility" of changes, the suspension clause was applied to permit recovery.[138]

The recent case of the *George A. Fuller Co.*[139] shows the scope of the problem. This was a $1,032,784.72 claim, most of which was based on Government-caused delays. Two of the many individual delay claims warrant comment. In the first, the Government requested suspension of work pending changes in two portions of a long drainage system. The contractor ceased work on the entire line and 111 days later the Government delivered the new plans. The Board rejected an argument that the contractor had acted as a volunteer in closing the entire line, saying that to go on, knowing extensive changes were planned, would be "irresponsible in the extreme." The delay was considered unreasonable to the extent of

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[135] ASBCA No. 5343 (July 31, 1959), 59-2 BCA 2290.

[136] See James I. Barnes Constr. Co., ASBCA No. 5977 (Nov. 9, 1961), 61-2 BCA 3216.

[137] Townsco Construction Co., ASBCA No. 1169 (Oct. 26, 1953).

[138] Roten Construction Co., ASBCA No. 6268 (June 30, 1961), 61-1 BCA 3093.

[139] ASBCA No. 8524 (Dec. 10, 1962), 1962 BCA 3619.

57 days and recovery was ordered under the suspension clause. In the second claim, the Government advised of a change in waterproofing, but delayed the contractor for eleven days in order to secure the approval of the proposed price. This, the Board held, was unreasonable and compensable under the clause.

The Board does not always hold changes delays to be unreasonable, but usually the Government is held to a high standard—certainly higher than would be imposed by the Supreme Court or the Court of Claims.

d. Failure To Deliver Promised Material. Usually, delay caused by a failure to deliver promised material is compensable under a special Government-furnished Property clause.[140] If the contract does not contain such a clause, the suspension clause can be used. For example, in 1950 the Government contracted for a weather station promising to supply the communication system. When it failed to do so, the contractor sustained a $1,887.30 delay cost in insurance alone. The Board permitted recovery.[141] Interestingly, no mention was made of the degree of diligence employed by the Government to deliver on time. In the Court of Claims this seems to be the controlling factor.[142]

e. Sovereign Acts. Two recent cases involving so-called "sovereign acts" illustrate how the cold war can affect the problem of delays. They also show two different approaches to solution.

In the first case,[143] none other than Premier Nikita Khrushchev was the cause of the difficulty. In August 1959 the President announced a forthcoming State visit by the Russian Premier. As was expected, this created heated controversy. Chairman Khrushchev was to land at Andrews Air Force Base where the contractor in question was repairing runways. Both the State Department and Secret Service requested a shut down of base operations on the arrival day for security and control purposes. Accordingly, on September 12th, an official at Andrews notified all contractors to cease operations for the day of September 15th, which was done. For the delay of one day, the contractor claimed over $10,000 under the Suspension clause. The Engineer Board of Contract Appeals held that the shut down order was a sovereign act of the Government for which the United States could not be held liable, citing, among others, *Jones*, *Horowitz* and *Froeming*.[144]

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140 See, *e.g.*, Air Force Procurement Instructions 7–602.51 (Sept. 9, 1962).
141 J. A. McNeil Company, Inc., ASBCA No. 1156 (May 23, 1952).
142 Peter Kiewit Sons' Co., 138 Ct. Cl. 668 (1957).
143 Lane Constr. Corp., Eng. BCA 1977 (Sept. 20, 1961).
144 These three cases are discussed at page 13 *supra*.

Under almost identical circumstances the ASBCA reached a contrary conclusion. In *Empire Gas Engineering Co.*[145] the contractor was performing runway work at Loring Air Force Base, an "operational" part of the Strategic Air Command. On July 15, 1958 the President announced that troops had been ordered into Lebanon. All SAC bases were placed on alert, and on July 17th, at the direction of the Base Commander, the Contracting Officer issued a stop order to the contractor. Sixteen days later the order was lifted, but the contractor had sustained a loss of over $4,000.00 in delay costs.

The Board rejected the Government's argument that the Contracting Officer was a mere conduit through which the United States had announced a sovereign act which was general and public in nature. It felt the Contracting Officer's involvement was sufficient to distinguish the case from *Horowitz.* In granting recovery, it concluded:

> The fact that the suspension of work order was in writing addressed to the contractor by name, referring to the contract by number, and signed by the Contracting Officer as contracting officer is almost conclusive proof that such order was (1) an act of the Government in its contractual capacity and (2) issued in the exercise of the Government's right to suspend the work under the Suspension of Work clause.[146]

The view of the Engineer Board in the first case rests firmly on a sound legal base. The distinction drawn by the ASBCA in the second case seems transparent. For example, would the results have been different if the Base Commander had simply issued a general shut down order?

f. Some Comments on the Suspension Clause. It should be clear that the Suspension of Work clause (both new and old) is a versatile tool for handling the problem of delay in construction contracts. Only the major areas of application have been described, but the clause can be used in almost any situation where the Government improperly delays.[147]

Purportedly, inclusion of the clause creates no additional substantive rights for the contractor. The Board itself has said that to test the applicability of the clause it is necessary only to find whether the Government would be liable for damages in a suit

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[145] ASBCA No. 7190 (March 15, 1962), 1962 BCA 3323.

[146] *Ibid.*

[147] *E.g.*, Barnet Brezner, ASBCA No. 6194 (April 30, 1962), 1962 BCA 3381 (impossible specification), John M. Blair, ASBCA No. 7723 (Aug. 21, 1962), 1962 BCA 3479 (Non "Sovereign" Government Operations), Lewis Constr. Co., ASBCA No. 5509 (July 29, 1960), 60–2 BCA 2732 (faulty plans).

for breach of contract. Recovery is not always granted,[148] but, as the decisions indicate, the Board has gone beyond its own guideposts. They have applied the clause in situations where the contractor would not have been likely to find similar relief in the courts.

In general this liberal approach has been possible by narrowing certain judicial concepts and broadening others. First, the Board has implied contract conditions which the courts have been reluctant to imply. An example is the implied condition to have a site ready within a reasonable time—a concept rejected by the Supreme Court. Second, the Board has narrowed certain traditional defenses of the Government. Among these are the defense of "due diligence" when the Government fails to deliver promised material and the defense of "sovereign immunity" to non-contractual acts. Third, the Board has interpreted the term "unreasonable" liberally in favor of the contractor. Where the Court of Claims is prone to look to the nature of the contract and the circumstances surrounding the Government's actions, the Board looks to the duration of the delay. Thus, it is able to permit recovery, particularly in the area of changes, in a greater number of cases.

g. Experience Factors. The continued use of the suspension clause by the Corps of Engineers for over twenty years constitutes a ringing indorsement. A recent report by the Navy, which started during the new clause in July 1960, is more concrete.[149] At first, great administrative difficulties were foreseen by the Navy. As one administrator put it, they would be obliged to put wings on the buildings to house the lawyers processing delay claims. Yet after two years of operations only 14 delay claims had been received in a total amount of $51,000. These had been settled for $31,000 and not a single case had been appealed to the ASBCA! The newness of the clause was partly responsible, but field offices also reported that the presence of the clauses had "tightened contract administration." Contracting Officers were making every effort "to make sure the Government did not

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[148] See, *e.g.*, T. C. Bateson Constr. Co., ASBCA No. 5492 (March 16, 1960), 60–1 BCA 2552, where the Government "triggered" a strike by replacing union workers with Government employees, and J. M. Brown Constr. Co., ASBCA No. 3469 (July 27, 1957), 57–2 BCA 1377, where a flood occurring during the suspension period damaged machinery. In both of these cases the Board held the clause did not apply.

[149] "Suspension of Work clause—a Favorable Progress Report From BUDOCKS," Office of the General Counsel of the Navy Newsletter, Vol. 8, No. 4, Nov. 1, 1962.

delay." As the Public Works Officer of the 12th Naval District has stated.[150]

> [The clause] apparently resulted in stricter and tighter contract administration to make sure that Government-furnished materials and equipment were available on time, that approvals of drawings and changes were promptly made, and that realistic and properly coordinated construction schedules were prepared.

Harold F. Blasky, Deputy General Counsel of the Corps of Engineers and long supporter of the suspension clause, adds this thought:[151]

> [T]here is a third party beneficiary to the suspension concept. In a time when the courts are overloaded and far behind in their docket schedules, when the old saying that justice delayed is justice denied has real meaning for every claimant, it is truly a major advance to incorporate into the construction contract a procedure which inevitably will lighten the work load of the courts and at the same time furnish the Government and the Contracting Officer with the administrative means of healing the wound before the patient expires.

Thus, the clause seems to afford the following advantages:

1. It gives the Government flexibility in contract administration.

2. It avoids termination by the contractor when he feels the Government may have breached.

3. It furnishes a quick and inexpensive administrative remedy for the contractor.

4. It provides a basis for bidding when considering the possible cost of delay.

5. It tightens contract administration.

6. It reduces the necessity for litigation.

Of course, none of these advantages will accrue to either party if the clause is not included in the contract. In this respect the potential value of the clause has been limited, for it is authorized only in construction contracts and then only on an optional basis.

3. *The Stop Work Order Clause in Negotiated Supply Contracts*

We have seen the broad remedial effect which the Suspension of Work clause has had on delays in construction contracts. Unfortunately, in the area of supply contracts there has been no

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150 Address by Captain J. J. McGaraghan, USN, First Federal Contracts Conference, Sept. 20, 1962 (sponsored by Associated General Contractors) The Constructor Magazine, Oct. 1962, p. 29.

151 Address before the U.S. Government Construction Contracts Conference, Nov. 7, 1961. Text on file in Office of the General Counsel, U.S. Army Corps of Engineers.

counterpart to "GO–11." This has meant that when a supply contractor was delayed he was forced to the courts with a suit for breach of contract.

The first step toward a balancing of administrative remedies between construction and supply contracts was taken by the Department of Defense on July 22, 1960. On that date a "Stop Work Order" clause for supply contracts was issued in ASPR;[152] the full text of the clause is set forth in Appendix C.

What does the clause do? First, it gives the Contracting Officer the right to suspend work for 90 days, at the conclusion of which the contractor either proceeds with the work or the contract is terminated. Secondly, if the suspension results in increased time or cost requirements, the contractor is entitled to an equitable adjustment for each. The clause is similar to the suspension clause in construction contracts, but there is one important difference. In this clause there is no requirement that the contractor be "unreasonably" delayed.

The implementing instructions[153] authorize the clause on an optional basis in negotiated, fixed-price supply contracts, whenever a work stoppage might be required because of "advancements in the state of the art, production or engineering break-throughs, or realignment of programs." The approval of the next higher authority is required before the stop order can be issued.

The clause is too new to have been interpreted by the courts or administrative boards, but like "GC–11" it is certain to have effects beyond those envisaged by its drafters. It was first recommended by the Air Force in October 1959.[154] This Department felt there was a need for a clause which would give the Government the right to suspend the work and at the same time provide for a claims procedure. Questions had apparently been raised when such orders were issued in the past, though contractors had usually complied with the orders.

The ASPR Committee Minutes show the clause was intended to cover delays resulting from both changes and terminations.[155] No specific mention was made of the fact that the Government already had the right to delay in making changes or that the ASBCA had held that delay costs could properly be paid under the Termination for Convenience clause.[156]

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[152] ASPR, 12th Revision, para. 7–105.8 (Nov. 26, 1962).

[153] *Id.* para. 7–105.8(a), (b).

[154] See letter from Air Force Member to ASPR Committee Chairman, subject: Proposed "Stop Work Order" clause, Oct. 8, 1959.

[155] ASPR Committee Minutes (Oct. 21, 1959).

[156] L. P. Kooken, ASBCA No. 2091 (Sept. 14, 1954).

The chief concern of the committee was that the proposed clause covered the entire period of delay; whereas its counterpart, the Suspension of Work clause in construction contracts, covered only unreasonable delays. However, the majority of the committee felt that delays in the construction field were "in the nature of the trade," that the procurement of supplies involved "a different type of situation," and that, therefore, "there was no basis for a comparable 'reasonable period of time' in supply delays." [157]

There is no record of any discussion concerning a possible constructive application of the clause. The ASBCA is certain to use this doctrine just the way they constructively applied "GO–11." It may well come as a surprise to some Contracting Officer to find that, without formal action, he has by delaying the contractor obligated the Government for substantial delay costs.

The restrictions placed on the use of the Stop Work Order clause will prevent it from attaining the importance in supply contracts that the Suspension clause has attained in construction contracts. It is, however, a start in providing administrative relief for suppliers. Moreover, it introduces a new approach or philosophy as to what the Government's responsibilities should be—it pays for all Government-caused delay, reasonable or unreasonable.

4. *The Government-Furnished Property Clause.*

In Section I we discussed the approach of the Court of Claims to the problem of Government-furnished property. Where there has been late delivery, the test has been one of diligence. If the Government has not warranted delivery by a particular date and has been diligent (but unsuccessful) in making delivery, it cannot be liable. The uncertainty which this rule has created has been attacked in two ways:

First, there have been exculpatory clauses expressly denying liability. *Ozark Dam* had such a clause and we have seen how unfavorably the Court of Claims viewed it.[158] Until 1961 the Navy used a clause which provided that the Government did not "warrant or guarantee any time or times for delivery" and that the Government would "not be liable" for a failure to deliver.[159] Not-

[157] ASPR Committee Minutes (June 3, 1960). The Navy did not agree that there was any difference between construction and supply contracts. They felt both types should receive "parallel" treatment, but that if any change was to be made it should be made in the "unreasonable" proviso of the construction clause.

[158] Ozark Dam Constructors v. United States, 130 Ct. Cl. 76, 112 F. Supp. 363 (1955).

[159] NAVDOCKS Form 113 (Dec. 1959).

withstanding the Court of Claims' view that such a clause is against "public policy," but the ASBCA and the Comptroller General have held that it constitutes an "absolue bar" to delay claims.[160]

The second approach was to broaden rather than restrict the Government's liability. The 1950 edition of the Armed Services Procurement Regulations contained a supply contract clause under which the Government warranted timely delivery and agreed that if it failed to perform, an equitable adjustment would be made in price.[161] There has been a definite trend toward the use of this type of provision as opposed to the exculpatory clause.

The Federal Procurement Regulations do not prescribe a standard Government-Furnished Property clause for either supply or construction contracts.[162] However, the Department of Defense prescribes a mandatory clause for supply contracts.[163] The pertinent portions of this clause are set forth in Appendix D. Like its predecessor, the present clause provides that the Government will deliver the property in accordance with a schedule or in sufficient time to enable the contractor to meet his performance dates. If the Government fails in its obligation, the contractor is entitled to an equitable adjustment for delay.

In construction contracts there is no true uniformity. The Army prescribes a separate clause, almost identical to the supply clause, for all construction contracts where the Government is to furnish materials.[164] The Navy prescribes a clause which allows an equitable adjustment but makes recovery dependent upon the inclusion of a suspension clause.[165] The Air Force incorporates the Armed Services Procurement Regulations supply clause with minor modifications.[166]

Carteret Work Uniforms[167] provided an early test of the liberalized Government-Furnished Property clause. This was a contract

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[160] Ken's Electric Co., ASBCA No. 7750 (July 7, 1962), 1962 BCA 3507; 40 DECS. COMP. GEN. 361 (1960).

[161] ASPR, Revision of March 1951, para. 13–502. World War II clauses neither admitted nor denied liability for delays. War Dept. Procurement Reg. § 1301.28 (Aug. 13, 1943).

[162] F.P.R., Part 1–7 (Nov. 21, 1961).

[163] ASPR, 12th Revision, para. 13–502 (Nov. 26, 1962).

[164] Army Procurement Procedure, changes No. 20, para. 13–502.50 (May 6, 1960).

[165] NAVDOCKS Form 113 (June 1961). This represented a substantial change from prior forms which specifically warned the contractor that the Government did not warrant delivery and would not be liable for delay. See, *e.g.*, NAVDOCKS Form 113 (Dec. 1959).

[166] Air Force Procurement Instructions, para. 7–602.51 (Sept. 25, 1962).

[167] ASBCA No. 1015 (July 25, 1952).

for uniforms and the Government had promised to furnish the material. When the Government delayed in doing so, the contractor sustained stand-by costs. Before the ASBCA, the Government contended that the contractor was entitled only to an extension of time and that *Rice* barred recovery of delivery costs. The Board rejected both contentions and held that this was precisely the type of situation the clause was intended to cover. No mention was made of the Government's diligence. Since this case the Board has consistently permitted recovery under a clause such as that presently prescribed in the Armed Services Procurement Regulations.[168]

The Government-Furnished Property clause solves many of the problems inherent in the Government's failure to keep its promise of delivery, but the clause can be of value only if it is included in the contract. If it is not included the Board will hold it is without jurisdiction;[169] the claim is then for damages and the contractor must sue in the Court of Claims and prove a lack of diligence on the part of the Government.

5. *The Termination for Convenience Clause*

A final situation, not previously discussed, relates to delays under the Termination for Convenience clause. The courts have long recognized the right of the Government to terminate a contract for its own convenience, even in the absence of a contract clause.[170] Technological advancements and fluctuating world conditions necessitate that the Government have this right. Nevertheless, as early as World War I the Government began including a contract clause expressly giving it the right to terminate for convenience.[171]

The Federal Procurement Regulations prescribe Termination for Convenience clauses on an optional basis, but the Department of Defense has made them mandatory in supply contracts of over $2,500 and construction contracts of over $10,000.[172] No useful purpose would be served in setting forth detailed provisions as the delay problem is purely a collateral matter. Suffice to say that the clauses provide the Government with the right to terminate

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168 Spencer Explosives, Inc., ASBCA No. 4800 (Aug. 26, 1960), 60–2 BCA 2795; A. Du Bois & Sons, Inc., ASBCA No. 5176 (Aug. 31, 1960), 60–2 BCA 2750; Lake Union Drydock Co., ASBCA No. 3073 (June 8, 1959), 59–1 BCA 2229.

169 Corbetta Constr. Co., ASBCA No. 6821 (Oct. 3, 1961), 61–2 BCA 3170.

170 United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1876).

171 Dorris Motor Car Co. v. United States, 271 U.S. 96 (1926).

172 F.P.R. 1–8.701 (Dec. 27, 1962) (supply contracts), implemented by ASPR, Revision No. 12, para. 8–701 (Nov. 26, 1962); F.P.R. 1–8.703 (Dec. 27, 1962) (construction contracts), implemented by ASPR, Revision No. 12, para. 8–703 (Nov. 26, 1962).

for any reason. Under a claim arrangement the contractor is then reimbursed for his expenses.

The first step in a termination is a stop order issued by the Government. Upon receipt of this the contractor must cease production and this is when the delay cost problem starts. In the normal case the only question is: can the contractor recover the delay costs he incurs from the time the stop order is issued until the contract is closed out? The answer of both the ASBCA and the Comptroller General has been yes.[173]

The granting of delay costs under the Termination for Convenience clause has had repercussions in the area of the Changes clause. For a partial termination the contractor could recover. For a change he could not. Most changes contain some deletion of work. Are these changes or partial terminations?

Nolan Brothers, Inc.,[174] shows the problem in the extreme. There, a $4,000,000 paving contract was reduced by 70 percent by means of a Change Order. The contractor had sustained substantial delay costs while the Government was making up its mind what to do. He argued that the contract had, in fact, been terminated and that he was entitled to an equitable adjustment for delay.

The Government contended that delay costs could not be paid as action had been taken under the Changes clause. The Board agreed with the contractor. They held this was a "cardinal change" beyond the scope of the Changes clause and no matter how the Government had gone about it, they had in fact terminated. Delay costs were accordingly granted.

The *Nolan* decision has not, however, opened the door to delay claims for deductive changes. The Board insists that a "cardinal change" be involved before they will apply the doctrine.[175]

A more critical problem arises when the Government tells the contractor to stop, pending termination, but then reverses its decision and orders him to continue the work. This is what took place in *Globe Building Materials Co.*[176] The contract was for demolition of certain World War II Navy barracks. The contractor had started work when the Korean Conflict arose and caused doubts as to whether the barracks would not be needed again. A stop

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[173] Serge A. Birn Co., ASBCA No. 6872 (April 20, 1961), 61-1 BCA 3019; L. P. Kooken Co., ASBCA No. 2091 (Sept. 14, 1954); 41 DECS. COMP. GEN. 379 (1961). The last decision was based on ASPR 8-301 which provided that the contractor should be "fairly" compensated for necessary preparations in terminating.

[174] ASBCA No. 4378 (Aug. 25, 1958), 58-2 BCA 1910.

[175] Fred A. Arnold, ASBCA No. 7761 (Sept. 21, 1962), 1962 BCA 3508.

[176] ASBCA No. 770 (March 14, 1954).

order was issued pending decision as to termination, but after 22 days the contractor was ordered to continue the work. The contractor asked for reimbursement of delay costs.[177]

The ASBCA compared the situation to that under the Changes clause. After looking to the *Rice* case they held:

> By analogy, it would appear that the Court would also hold that under Article 9(d), which provides for termination of contract work for convenience of the Government, a similar right is possessed by the Government to delay a contractor's performance for a reasonable period while considering whether or not a termination order is to be issued, or whether a contemplated termination order is to provide for complete or partial termination.

Unfortunately, the courts have not decided the question, though the Board continues to follow its holding in *Globe*.[178] The analogy between changes and terminations is at best strained. The situation seems more akin to a simple breach of contract than the exercise of any reserved right to delay.

6. *Computation of Delay Costs*

Absolute certainty in the computation of delay costs is not required.[179] It is sufficient if under all facets and circumstances a reasonable approximation can be made.[180] Nor is the period of delay all controlling, for as the Board has found: "The real question is neither how long the work was suspended nor how long the suspension delayed the completion of the project, but how much additional expenses resulted from the suspension." [181]

Review of the decisions of the ASBCA shows that the Board is fully competent to place dollar values on delay periods.[182] The fears of those who felt it would be impossible to administer clauses such as the Suspension of Work clause have been largely disproved. The burden of proof is on the contractor,[183] and the problem is one of accounting and common sense. No purpose would be served in delving into the intricacies by which the Board arrives at its cost conclusions—usually, with an assist from a Government audit agency. Ratios are used to determine the value of equipment and the cost of overhead.[184] The Board has been able to determine the

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[177] A unique method of demolition resulted in unusual delay costs. Private individuals were urged by extensive radio and newspaper advertising to come to the site and dismantle (and buy) what they wanted. When the stop order was issued all of the value of the advertising was lost.

[178] Wayne Constr. Co., ASBCA No. 4934 (Feb. 27, 1959), 59–1 BCA 2130.

[179] Needles v. United States, 101 Ct. Cl. 535 (1944).

[180] Chandler v. United States, 127 Ct. Cl. 549 (1954).

[181] Howard B. Nilsen, ASBCA 5343 (July 31, 1959), 59–2 BCA 2290.

[182] *E.g.*, Lite Mfg. Co., ASBCA No. 4755 (1958), 58–2 BCA 2009.

[183] E. V. Lane Corp., ASBCA No. 7232 (March 14, 1962), 1962 BCA 3327.

[184] Eichleay Corp., ASBCA No. 5183 (July 29, 1960), 60–2 BCA 2688.

relative cost of as many as 35 different items of delay expense within a single contract.[185]

The question of profit deserves final mention. The new Suspension clause expressly excludes it. The Associated General Contractors have quite naturally favored its inclusion. They take the position that whenever a suspension "makes idle a contractor's plant, equipment and supervisory staff, he is deprived of an opportunity to put this same organization at some other profitable operation." [186] Profit is not usually recoverable in the Court of Claims, though there have been earlier exceptions.[187] The Board, on the other hand, generally allowed profit under the old Suspension of Work clause.[188] The strongest argument against profit is that it discourages the contractor from mitigating his delay costs. In effect, it operates like a cost-plus-percentage-of-cost contract. From this practical viewpoint it would seem logical to exclude profit.

IV. CONCLUSION

Many Government contracts are unsatisfactory from the viewpoint of both parties because they do not clearly indicate who is to bear the risk of Government-caused delay. This failure has created uncertainty, which in turn has resulted in expensive litigation. There is almost universal agreement on the need for clarification. But beneath this technical deficiency is the more basic question of whether the Government should increase its responsibilities as well as clarify its position.

There are some who believe that the Government will benefit most by having the contractor assume as many risks as possible. These champions of the exculpatory clauses argue, *reductio ad absurdum*, that if the Government will benefit by assuming delay risks, it must follow that it will benefit by assuming all risks; that, in effect, proponents of pay-for-delay clauses are turning the fixed price contract into a cost reimbursable contract; that experience has shown cost reimbursement contracts are less efficient and more costly; and that, therefore, rather than increasing the Gov-

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[185] Lake Union Drydock Co., ASBCA No. 3073 (June 8, 1959), 59-1 BCA 2229.

[186] Letter from Executive Director, Associated General Contractors to Chairman, Task Force for Review of Government Procurement Policies, Nov. 18, 1958.

[187] *Compare* The Rust Eng'r. Co. v. United States, 86 Ct. Cl. 461 (1938), *with* McClintic-Marshall Co. v. United States, 59 Ct. Cl. 817 (1924), *and* United Engineering & Contracting Co. v. United States, 47 Ct. Cl. 489 (1912).

[188] See, *e.g.*, A. DuBois & Sons, Inc., ASBCA No. 5176 (Aug. 31, 1960), 60-2 BCA 2750; P. M. Mfg. Co., ASBCA No. 4054 (Sept. 22, 1958), 58-2 BCA 1934; Lilley-Ames Co., ASBCA No. 3023 (Aug. 14, 1956), 56-2 BCA 1039.

ernment's responsibility, we should reverse the trend and place more risks on the contractor.

There are really two answers to this position: First, there is more involved here than financial advantage to the Government; there is a basic question of fairness or justice which transcends mere dollars and cents. Second, even if the matter is placed on a purely pecuniary basis, it seems the Government will benefit by increasing its responsibility.

Is it fair for the Government to ask the contractor to assume the delay risks he is now bearing? This problem cannot be approached from the abstract; each of the various delay situations must be examined to determine what risks are involved and what the results have been. When this is done at least three situations stand out as inequitable: changes, site availability and sovereign acts. This is not to say that the law relating to Government-furnished material is totally satisfactory. It is not. But in that area —where the Supreme Court has yet to decide a case—there is at least some balance in the distribution of risks.

In the area of changes, the Government has turned what would normally be a breach of contract into a reserved right under the contract. Each time the Government exercises this right, the contractor chances a delay loss. A similar situation arises in site availability. There the contractor must assume, in addition to natural risks, the risk of the Government's poor planning or negligence. As to sovereign acts the Government places all risks on the contractor, no matter how susceptible the contract may be to such interruptions.

There is a fundamental difference between natural risks and the risk of Government-caused delay. The latter is truly "unnatural" in that control is vested in the other party to the contract, a party normally charged with the duty of cooperation. This difference more than justifies separate treatment of the problem and renders unnecessary any conclusion as to whether the Government should assume all contract risks. In other words, one can be opposed to cost reimbursable contracts and still believe that in this particular area the Government should assume more responsibility.

But if there are contractors who are willing to run these risks, and apparently there are many, why not let them? To this it can be said that society in general has an interest in how contracts are made, particularly Government contracts. We are faced with what Dean Pound might call competing social interests, the interest of freedom of contract against the interest in the welfare of the contractor. Pound would ask:

> **Is it wise social engineering, under the actual social and economic conditions of the time and place, to limit free self-assertion, or what in appearance is free self-assertion, for a time in certain situations? Does it secure a maximum of our scheme of interests as a whole, with the least sacrifice, to leave persons in certain relations free to contract as they choose or as their necessities may seem to dictate, or should we rather limit what is not under actual conditions a free choice?** [189]

Whether there is true "freedom of contract" in Federal procurement is open to question. Certainly there is ever increasing pressure on the corporate executive to obtain a share of growing Government expenditures. At the bargaining table the contractor generally finds that price is the primary question. The contract clauses themselves are non-negotiable; they are standard and must be included.

Is it wise social engineering in this instance to include clauses which place unnatural risks on the contractor, and which may, at the Government's option, result in substantial losses or bankruptcy, regardless of the contractor's prudence and efficiency? It would seem not. It is therefore submitted that a redistribution of risks is in order and that the Government should in the interests of fairness increase its responsibilities.

There are, however, reasons more compelling than equity and fairness for expanding the Government's responsibilities. From a strict financial viewpoint the Government has much to gain by such action.

The Government is paying for the right to delay. The Supreme Court has always spoken of this right as something the Government has purchased, and they were certain that the "men who make million-dollar contracts" protected themselves by higher prices. Likewise, the Court of Claims has concluded that the right to delay increases prices, and they have questioned the economic wisdom of the Government's purchasing the right to delay. This view has been shared by the various committees and Task Forces which since 1922 have attempted to eliminate delay costs from the bargain.

Unfortunately, there are no statistical studies which show the annual amount the Government is paying for its right to delay. There have been cases where the contractor has established a specific delay fund, but in most contracts the cost is doubtlessly lumped in a flat percentage charge which might be labeled "cost of doing business with the Government." The point is that regardless of how the contractor handles it, the Government is buying the right to delay in the vast majority of its contracts.

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[189] 3 POUND, JURISPRUDENCE 286 (1959).

What is the overall result of this arrangement for the Government? As the right to delay is exercised in only a minority of contracts, it stands to reason that in the majority of cases the Government is paying for something it never uses. Therefore, most contractors receive a windfall of the amount they have charged for delays. On the other hand, in the relatively few cases where the Government makes extensive use of its right, it experiences a gain, for the contractor bears the loss. However, it is apparent that when the Government's total premium for delay is balanced against the few gains made, the Government comes out on the short end of the arrangement.

From the foregoing, it follows that if the Government reverses the process—quits paying delay premiums and starts paying delay claims—it will be to its financial advantage. If delay contingencies are no longer necessary, the law of competition will eliminate them and bid prices will drop accordingly. Broadened competition will also be achieved. Some contractors are perfectly willing to take risks, but are unwilling to take the "unnatural" risk of Government-caused delay. These contractors will be drawn more closely into the bidding. In the final analysis the amount saved will be more than sufficient to cover the additional delay payments and the cost of administering them.

Opponents of pay-for-delay clauses argue, in essence, that the Government is not really paying for the right to delay. Competitive bidding, it is said, eliminates such contingencies. The thoughtful bidder knows he can never protect himself completely, so he is willing to bear the risk alone and at no charge, in order to win the bid.

The fallacy in this reasoning lies in the assumption that contractors are willing to run risks at no cost. To be sure an occasional imprudent bidder may be found who is willing to risk almost anything,[190] but by and large the idea of running a risk without compensation is repugnant to a businessman. He has a minimum below which he will not go. This will, of course, vary from contractor to contractor because the hope of an award is a powerful incentive. However, it is not so powerful as to completely eliminate contingency reserves. If the contrary were true, the insuring of weather risks would not have attained universal acceptance. It seems fair to conclude, as have the courts and the committees, that the right to delay is an expensive item of cost.

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[190] In view of the expense involved in defaults, appeals and extraordinary relief, it may be questioned whether the Government gains by awarding a contract to an imprudent contractor.

The only avenue of reform open to the Government is revision of the contract clauses. In certain isolated areas standard contract clauses have eliminated the need for Government-caused delay contingencies. Under a Government-Furnished Property clause, for example, the contractor knows that if the Government does not deliver he will be reimbursed administratively through an equitable adjustment. Under the Suspension of Work clause the constructor knows he will be compensated for unreasonable delays. In most areas, however, the contractor is unprotected.

The "cost of doing business for the Government" can be brought down only if there is a uniform treatment of contractors throughout Government. In the area of delay costs there is a lack of uniformity between supply contracts and construction contracts which cannot be justified. It seems inconsistent to allow a supplier to recover delay costs for unchanged work, while at the same time a contractor is denied such costs. It seems equally inconsistent to allow a constructor to recover administratively for unreasonable delays, while at the same time this remedy is denied the supplier. The subcommittee which created the recent Stop Order clause for supply contracts felt that insofar as delays were concerned there was no difference between the two types. If a difference does exist, it is only in the degree of risk involved. This does not seem a valid basis for separate treatment.

There is also a lack of uniformity among the various agencies of Government. If a constructor does work for the Corps of Engineers, he will have a Suspension of Work clause. If he works for Navy, he will have it if the contract exceeds $25,000. If he works for the Air Force he will probably have nothing. Similarly, supply contracts for the Department of Defense will have a Government-Furnished Property clause affording administrative relief for delays, whereas supply contracts for other Government agencies usually contain no administrative remedy.

A contract clause must be mandatory if it is to be effective. Clauses such as the Suspension of Work clause definitely increase the Contracting Officer's burden. No longer is he able to brush aside the contractor's delay claims with a sympathetic letter indicating a remedy is beyond his authority. The spotlight is immediately focused upon him and he must work out an equitable adjustment with all the administrative and budgetary details this encompasses. Human nature being what it is, it is too much to ask of this public official voluntarily to add to his burden by including a particular contract clause. If any uniformity is to be

achieved, the Contracting Officer cannot be given an option—inclusion of the clause must be mandatory.

Suspension of Work clauses have a demonstrated value in providing an administrative solution to the problem of Government-caused delay. In the construction field, these clauses have proved administratively workable and have collateral advantages in preventing termination by the contractor (when he feels the Government may have breached), in tightening contract administration and in reducing litigation. However, the full value of Suspension clauses has been limited in that in theory they apply only to situations where the Government would be liable for breach of contract, *e.g.*, where the Government has been "unreasonable." In practice the Boards have extended application beyond this limitation. Contracting Officers are no doubt doing likewise. If payments are being made for "unchanged" work it is consistent to assume payments are also being made for "unreasonable" delays. There is a perceptible trend away from the payment-for-breach-only idea.

The reasons for limiting payments to unreasonable contractual acts are judicial tradition and increased expense. The former should carry little weight as the Government, not the courts, should determine the terms and conditions, within any statutory proscriptions, under which it will contract. The latter reason seems objectively invalid. If the Government limits its responsibility to situations where it has been "unreasonable," the contractor will still have to provide a contingency for "reasonable" delays. By providing for all Government-caused delay, the Government will remove the necessity for any contingency. Thus the added expense in paying all Government-caused delays will be compensated for by a reduction in bid prices.

It is therefore concluded that both the contractors and the Government will benefit if clauses are included in all Government contracts which provide an equitable adjustment in price as well as time for all Government-caused delays, contractual or sovereign.

Accordingly, the following specific recommendations are made to increase the Government's responsibility:

1. *Changes:* The standard Changes and Changed Conditions clauses for construction contracts (Appendix A) should be amended to include an equitable adjustment in the price of all work, "whether or not changed."

2. *Site Availability:*

a. If it is feasible, the job of site preparation should be com-

bined with the building contract. As many collateral matters as possible should be included in this single contract.

b. Unless unusual circumstances are present, the Government should warrant site availability by expressly providing that the "notice to proceed" will be issued and the site will be ready for work within a certain number of days after award of the contract.

c. If it cannot be determined when the site will be available the "invitation for bids" should clearly state this fact. The Government should, in addition, warrant that it will make every effort to ready the site as soon as possible after award.

3. *Government-Furnished Property:* The present Government-Furnished Property clause prescribed by the Armed Services Procurement Regulations (Appendix D) should be prescribed by the Federal Procurement Regulations for mandatory use whenever the Government is furnishing materials under the contract.

4. *Standard Suspension of Work Clause:* A standard Suspension of Work clause should be prescribed by the Federal Procurement Regulations for mandatory use in all fixed price Government contracts. This clause should provide for an equitable adjustment in price whenever the Government causes delay. Appendix E contains a proposed clause to accomplish this end. It incorporates certain features of the present Suspension of Work clause (Appendix B), but provides for an equitable adjustment in the event of Government-caused delay which falls short of a clear cut breach of contract. Under the present clause breach of contract is the determinative factor. The proposed clause is submitted with the knowledge that a single mind cannot generally foresee all possible consequences of a given contract clause. It is not intended as a complete solution, but rather as a starting point from which an appropriate Government agency can begin a new analysis of the problem of Government-caused delays.

APPENDIX A

1.

Changes Clause—Fixed Price Supply Contract [STANDARD FORM 32 (General Provisions—Supply Contract) (Sept. 1961 Edition)].

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such changes causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date or receipt by the Contractor of the notification of change, *provided*, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

2.

Changes Clause—Fixed Price Construction Contract [STANDARD FORM 23–A (General Provisions—Construction Contract) (April 1961 Edition)]

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the "Disputes" clause of this contract; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.

3.

Changed Condition Clause—Fixed Price Construction Contract [STANDARD FORM 23–A (General Provisions—Construction Contract) (April 1961 Edition)].

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the "Disputes" clause of this contract.

APPENDIX B

Price Adjustment for
Suspension, Delays, or Interruption of Work

[Authorized by Fed. Procurement Reg. Sec. 1–7.602 (Jan. 20, 1960), and Armed Services Procurement Reg., 12th Revision, para. 7–604.3 (Nov. 26, 1962)].

(Fixed Price Construction Contract)

(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.

APPENDIX C

Stop Work Order [Authorized by Armed Services Procurement Reg., 12th Revision, para. 7-105.8 (Nov. 26, 1962)].

(Negotiated Supply Contract)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of ninety (90) days after the order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this clause. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90) days after a stop work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

(i) cancel the stop work order, or

(ii) terminate the work covered by such order as provided in the "Termination for Convenience" clause of this contract.

(b) If a stop work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if—

(i) the stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract, and

(ii) the Contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage; *provided* that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.

Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(c) If a stop work order is not canceled and the work covered by such order is terminated for the convenience of the Government, the reasonable costs resulting from the stop work order shall be allowed in arriving at the termination settlement.

APPENDIX D

Government-Furnished Property [Authorized by Armed Services Reg., 12th Revision, para. 13–502 (Nov. 26, 1962)].

(Fixed Price Supply Contract)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." In the event the Government-furnished Property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

APPENDIX E

Government-Caused Delays, Suspensions, or Interruptions

(Proposed)

a. The Contracting Officer may order the contractor in writing to suspend all or any part of the work for such period of time as he may deem appropriate for the convenience of the Government.

b. If the performance of all or any part of the work is suspended, delayed, or interrupted by an act or omission of the Government, an equitable adjustment in contract price shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by such suspension, delay, or interruption, and the contract shall be modified in writing accordingly.

c. As used in this clause, the term "act or omission of the Government" shall include (1) suspension orders issued by the Contracting Officer pursuant to this clause (2) any act of the Government, not expressly authorized by this contract, which results in delay of the work, or (3) any failure by the Government to perform an express or implied obligation within the time specified in this contract, or, if no time is specified, within a reasonable time.

d. If otherwise proper under this clause, the contractor shall not be denied an equitable adjustment in price because the delay in question resulted from (1) an act or omission of another Government contractor which impedes or otherwise prevents performance of this contract (2) an act of the Government pursuant to a reserved right not expressly provided for by this contract, or (3) a sovereign act of the United States.

e. Notwithstanding the foregoing provisions, no equitable adjustment in price shall be made, and no claim for such adjustment allowed, for any period of delay (1) expressly provided for by this contract (2) resulting in whole or part from the negligence of the contractor (3) necessary in terminating this contract for default (4) extending more than twenty days prior to the date that the contractor shall have notified the Contracting Officer in writing of the fact of the delay, unless a suspension order has been issued by the Contracting Officer, or (5) for which a written claim is not promptly made prior to final settlement.

PUBLIC POLICY AND PRIVATE PEACE—THE FINALITY OF A JUDICIAL DETERMINATION*

BY CAPTAIN MATTHEW B. O'DONNELL, JR.**

I. INTRODUCTION

The state in its responsibility to society as a whole has a vital interest in seeing that the guilty shall not go unpunished for their crimes. It could well be that the very existence of the state could depend on the fulfillment of this policy. But this natural desire for retribution does not stand alone.

There are other policy considerations—countervailing, perhaps, but not necessarily inconsistent—to be taken into account. For the state also has an interest in seeing that there be an end to litigation. Additionally, there exists the proposition that it is basically unfair to require a person to be tried more than once without his consent for the same cause. As the Supreme Court has stated, a person should be required to run the gantlet but once.[1]

The problem arises most frequently when what is essentially a single act or course of criminal conduct is made the basis for successive criminal prosecutions. It is the purpose of this paper to examine the problem of successive trials in light of these considerations of public policy and private peace. An analysis of federal and military practice in this area will be made with appropriate emphasis accorded to the doctrines of double jeopardy, res judicata, and law of the case.

II. DOUBLE JEOPARDY IN THE FEDERAL SYSTEM

A. *HISTORICAL DEVELOPMENT OF THE DOCTRINE*

The fifth amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to

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[1] Green v. United States, 355 U.S. 184, 190 (1957).

be twice put in jeopardy of life or limb . . . ." [2] Although the provision was at first construed to prevent a convicted defendant from obtaining a writ of error and a new trial,[3] this approach was not followed by other federal courts.[4] The Supreme Court resolved the dispute in *United States v. Ball* [5] by holding that a defendant who successfully appeals a conviction may be subsequently retried for the same offense of which he had been convicted. This result was reached on the theory that a defendant, by appealing, should be deemed to have waived his objection against being subjected to another trial on the same charges.

In deciding whether the government may appeal an erroneous acquittal, the Supreme Court has distinguished between state and federal precautions. In *Kepner v. United States*,[6] the Court held that to permit the federal government to appeal an acquittal would violate the double jeopardy provisions of the fifth amendment. Mr. Justice Holmes dissented [7] on the grounds that the waiver theory has no place in a discussion of double jeopardy. He agreed that an accused should be able to appeal an erroneous conviction and thereby be subject to retrial if successful, not on the grounds that he had waived a basic constitutional right, but because the jeopardy is "single" rather than "double." In other words the theory is one of continuing jeopardy, which also permits the government to appeal an erroneous acquittal without the accused being placed twice in jeopardy.

As to state prosecutions, the Supreme Court held in the case

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[2] The constitutional prohibition against double jeopardy relates only to successive prosecutions for the same offense and is not concerned with the question of multiple punishment at a single trial for several offenses arising out of a single transaction or course of conduct. See Abbate v. United States, 359 U.S. 187, 197–201 (1959) (separate opinion of Mr. Justice Brennan); Gore v. United States, 357 U.S. 386 (1958); United States v. Sabella, 272 F.2d 206, 211–12 (2d Cir. 1959). *But see* Note, 65 YALE L.J. 339, 350 (1956).

[3] United States v. Gibert, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D. Mass. 1834). This result is not as shocking as might first appear when it is realized that the court was following British precedents which construed the common law pleas of *autrefois acquit* and *autrefois convict*—the common law analogue of double jeopardy—as completely precluding any second trial.

[4] United States v. William, 28 Fed. Cas. 636 (No. 16,707) (C.C.D. Me. 1858); United States v. Harding, 26 Fed. Cas. 131 (No. 15,301) (C.C.E.D. Pa. 1846); United States v. Connor, 25 Fed. Cas. 595 (No. 14,847) (C.C.D. Mich. 1845).

[5] 163 U.S. 662 (1896).

[6] 195 U.S. 100 (1904).

[7] *Id.* at 134.

of *Palko v. Connecticut* [8] that a state statute permitting the state to appeal in criminal cases for correction of errors of law was not unconstitutional. Mr. Justice Cardozo, speaking for the Court, assumed that *Kepner* correctly held that the fifth amendment prohibited a government appeal in federal prosecutions, but he went on to say that the due process clause of the fourteenth amendment did not prohibit double jeopardy and hence that a state may properly provide for prosecution appeals of errors of law. The Court rejected Palko's contention that the fourteenth amendment embodies all the protections of the Bill of Rights in general and of the double jeopardy provisions of the fifth amendment in particular. Rather, the Court held the fourteenth amendment protects only those rights "of the very essence of a scheme of ordered liberty." [9]

Even though the federal government may not appeal an erroneous acquittal, it was held in *Trono v. United States* [10] that when an accused charged with a crime is convicted only of a lesser included offense and successfully appeals his conviction thereof, he may be retried for the greater offense. The Court concluded that the defendant by appealing his conviction had waived his right to plead double jeopardy as to any part of the trial. The effect, in other words, was as though the first trial had never taken place. Thus, while the government could not appeal an erroneous acquittal, it could under the *Trono* doctrine retry an accused for an acquittal which was presumably free from error.[11]

This doctrine of "complete waiver" remained the law until 1957 when the Supreme Court held by a 5–4 decision that in a federal prosecution a defendant by appealing his erroneous conviction of a lesser offense did not reopen his acquittal of the

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[8] 302 U.S. 319 (1937). In this case the defendant was charged with first-degree murder but was found guilty only of second-degree murder and sentenced to life imprisonment. The government appealed pursuant to a state statute which permitted such appeal upon any question of law. The state supreme court reversed and ordered a new trial. The defendant was then found guilty of first-degree murder and sentenced to death.

[9] Palko v. Connecticut, 302 U.S. 319, 325 (1937). That this point is not accepted with complete unanimity is illustrated by the dissenting opinion of Mr. Justice Douglas in Hoag v. New Jersey, 356 U.S. 464, 477 (1958).

[10] 199 U.S. 521 (1905).

[11] Even Cardozo was careful to note that *Palko* did not extend to statutes which would permit the retrial of an accused following a trial free from error. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[12] Green v. United States, 355 U.S. 184 (1957). Although the Court did not expressly overrule *Trono*, the result certainly was to remove the accused from the "incredible dilemma" in which he was placed by virtue of the *Trono* decision.

greater offense.[12] Mr. Justice Frankfurter, vigorously dissenting, pointed out that a substantial number of states permit what the majority of the Court held to be a violation of a vital safeguard of society.[13]

B. *WHAT IS THE SAME OFFENSE?*

The fundamental rights of the accused with respect to double jeopardy have thus been judicially developed over the years. But the doctrine of double jeopardy is applicable only when the accused has been twice placed in jeopardy for the "same offense." The problem arises when one act violates several statutory norms or several acts in one transaction violate one statutory norm.

Generally, the courts, in attempting to determine whether two charges amount to the "same offense," have utilized one of two judicial devices, the "same evidence" test or the "same transaction" test. The former appears to be the more commonly accepted test in both state[14] and federal[15] courts. This test, often called the Buller rule in honor of the author judge, was first laid down in the English case of *Rex v. Vandercomb*[16] in which it was stated (denying a claim of *autrefois acquit*) that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."[17] The effect of the "same evidence" rule is to equate "offense" with the legal theory on which the accused is brought to trial.[18] Notwithstanding the strict interpretation of the "same evidence" test

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[13] *Id.* at 216, n. 4.

[14] See Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 IOWA L. REV. 317, 323 (1954); Note, 7 BROOKLYN L. REV. 79, 81, n. 26 (1937).

[15] See Note, 7 BROOKLYN L. REV. 79, 82, n. 27 (1937), citing among others Carter v. McClaughry, 183 U.S. 365 (1902) and Gavieres v. United States, 220 U.S. 338 (1911). *But see* Abbate v. United States, 359 U.S. 187 (1959) (separate opinion of Mr. Justice Brennan); United States v. Sabella, 272 F.2d 206 (2d Cir. 1959).

[16] 2 Leach 708, 168 Eng. Rep. 455 (1796).

[17] *Id.* at 720, 168 Eng. Rep. at 461. For a discussion of the rule and its several variations (e.g., Buller's rule in reverse, Buller's rule backwards, and a combination of Buller's rule and Buller's rule backwards) see Lugar, *supra* note 14, at 321–323 and Note, 7 BROOKLYN L. REV. 79, 82–83 (1937). For a good discussion of this test as well as the "same transaction" test, see Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941). This decision is also a leading case on res judicata and as such served as the basis for the first comprehensive annotation of that doctrine as applied to the criminal law. See Annot., 147 A.L.R. 987 (1941).

[18] For a criticism of the "same evidence" test as interpreted by the courts, see Kirscheimer, *The Act, the Offense, and Double Jeopardy*, 58 YALE L.J. 513 (1949).

which has been given by the courts, it remains the more popular rule. Nonetheless, a small number of state courts have adopted the "same transaction" test, according to which two offenses are the same—and thus the accused is being placed twice in jeopardy—if both were part of the same criminal transaction.[19] Although simple in expression, the test has proved to be somewhat complicated in execution. For example, in *Harris v. State* [20] the court indicated that the "same evidence" test must be used to determine what is the same transaction, "and in doing so has recognized the generally approved principle, that, in order for the transaction to be the same, it must be identical both as a matter of fact and as a matter of law."[21]

Either test, if applied liberally, would result in giving full effect to the double jeopardy doctrine. A mechanical application by the courts, however, has permitted what is essentially a single course of criminal conduct to be made the basis for successive prosecutions. To illustrate, in a recent case [22] the accused, together with two companions, allegedly robbed the owner of a tavern and three of his customers. The accused was first charged with robbing three of the four victims. Upon being acquitted of those offenses, he was then charged with robbing the fourth victim. He was tried and convicted. He appealed the conviction on the alternate grounds of double jeopardy and res judicata. The New Jersey Supreme Court held that the accused had not been placed twice in jeopardy for the same offense in violation of the state constitution since the evidence essential to convict him of the robbery of the fourth victim was not the same as that essential to convict him of robbing the first three victims.[23]

The dissenting opinion, basing its conclusion in part on the "single transaction" test, concluded that Hoag's "act" of robbing four men constituted only a single offense of robbery against the public, even though there may have been four "wrongs" (*i.e.*, trespasses) against the private citizens.[24]

On appeal to the United States Supreme Court it was held that the due process clause of the fourteenth amendment did not pre-

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[19] See Lugar, *supra* note 14, at 323, n. 26; Note, 7 BROOKLYN L. REV. 79, 83 (1937).

[20] 193 Ga. 109, 17 S.E.2d 573 (1941).

[21] *Id.* at 117, 17 S.E.2d at 579.

[22] State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958).

[23] The res judicata aspects of this case will be considered separately, *infra*, Section III.

[24] 21 N.J. at 512, 122 A.2d at 636.

vent a state court from applying the "same evidence" test in the situation presented in *Hoag*.[25] The court noted that although Hoag might be punished for each of the four robberies at a single trial, it did not necessarily follow that he could be punished for each robbery at separate trials. It was held, however, that under the circumstances of *Hoaq* the due process clause of the fourteenth amendment did not preclude successive trials.[26]

Such a mechanical interpretation of the "same evidence" test as applied by the New Jersey court in *Hoag* is what has rendered double jeopardy virtually ineffectual as a protection against successive prosecutions for offenses arising out of the same transaction. The following chapter will discuss to what extent the doctrine of res judicata may be used to avoid this result.

III. RES JUDICATA IN THE FEDERAL SYSTEM

A. *HISTORICAL DEVELOPMENT OF THE DOCTRINE*

The concept of res judicata has long been recognized as a principle of civil law. Within the framework of the doctrine as applied in civil law a distinction is made between the same and a different cause of action. Thus:

> A judgment has the effect of putting an end to the cause of action which was the basis of the proceeding in which the judgment is given. If the judgment is for the defendant and is on the merits, the cause of action is extinguished; that is, the judgment operates as a *bar*. If the judgment is for the plaintiff, the cause of action is extinguished but something new is added, namely, rights based on the judgment; there is a *merger* of the cause of action in the judgment. . . . In either case it is immaterial what issues were litigated or might have been litigated; it is immaterial that no issues were litigated.
>
> Very different is the effect of a judgment upon a subsequent controversy between the parties based upon a *different cause of action* but involving the same or some of the same *questions* which were involved in the original action. Here the judgment is conclusive between the parties only as to *matters actually litigated and determined* in the prior action; it is not conclusive as to matters which might have been but were not actually litigated and determined. The cause of action involved in the second proceeding is not extinguished by the judgment in the prior proceeding by way of bar or merger. But matters actually litigated and de-

[25] Hoag v. New Jersey, 356 U.S. 464 (1958).

[26] *Id.* at 467–69. *Cf.* Palko v. Connecticut, 302 U.S. 319, 328 (1937), where Cardozo condemned as unconstitutional an attempt "to wear the accused out by a multitude of cases with accumulated trials."

termined in the prior action cannot be relitigated in the latter action. As to such matters, we have said there is a collateral estoppel. . . .[27]

Res judicata rests on two maxims: (1) "No one ought to be twice vexed for one and the same cause" and (2) "It is for the public good that there be an end to litigation."[28] Within their respective spheres the application of res judicata and double jeopardy has been similar. Thus, the concepts of merger and bar in res judicata parallel those of *autrefois convict* and *autrefois acquit* in double jeopardy. Inasmuch as double jeopardy always relates to the same offense, there is no subordinate concept similar to collateral estoppel included within that doctrine.

While the principles of double jeopardy refer solely to criminal law, it does not follow that the rule of res judicata relates only to the civil law. There would be little reason to apply res judicata in the strict sense of merger and bar to criminal law, since the double jeopardy provisions would be applicable. But collateral estoppel is applicable to the administration of the criminal law.

Although one of the earliest applications of res judicata was in a criminal case,[29] the doctrine at first was generally applied only in civil cases.[30] It was not until 1916 that the Supreme Court held the doctrine to be directly applicable to criminal cases.[31] Earlier Supreme Court decisions, however, had indicated that the doctrine might apply to criminal prosecutions.[32]

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[27] Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 2–3 (1942) (emphasis added) (footnotes omitted). Additionally, there is the concept of "direct estoppel" which is applicable when the judgment is not rendered on the merits and thus does not preclude a second suit on the same cause of action but acts only as an estoppel of the matters determined by the judgment. For example, a judgment for the defendant on the ground that the plaintiff brought suit in the wrong form of action is not a judgment on the merits and does not preclude the plaintiff from suing on the correct form of action. He would be precluded, however, from bringing suit again on the same form of action. See Scott, *supra* at 3, n. 5; RESTATEMENT, JUDGMENTS, § 45, comment d, § 49, comment b (1942).

[28] See 2 FREEMAN, JUDGMENTS, § 626, at 1319 (5th ed. 1925); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 219–20 (1954); Von Moschzisher, *Res Judicata*, 38 YALE L.J. 299 (1929); Note, 33 IND. L.J. 409 (1958).

[29] Rex v. Duchess of Kingston, 20 How. St. Tr. 355 (1776).

[30] Prior to the fragmentation of criminal conduct into a multitude of statutory offenses with separate prosecution authorized, the common law pleas of *autrefois convict* and *autrefois acquit* were sufficient to protect the defendant from successive prosecutions for the "same offense."

[31] United States v. Oppenheimer, 242 U.S. 8, (1916).

[32] See, *e.g.*, Frank v. Mangum, 237 U.S. 309, 334 (1915); Coffey v. United States, 116 U.S. 436, 445 (1886).

In *Oppenheimer* the accused was indicted for conspiracy to conceal assets from a trustee in bankruptcy in violation of federal criminal law. His special plea in bar that the prosecution was barred by a one-year statute of limitations was sustained and judgment entered accordingly. When it was subsequently determined that the one-year statute of limitations did not apply, Oppenheimer was again indicted for the same offense. This time he moved to quash the indictment on the ground of the former judgment that the statute of limitations barred the suit.[33] The motion was granted and the government appealed on the grounds that the doctrine of res judicata did not apply to criminal proceedings "except in the modified form of the Fifth Amendment." [34] The Supreme Court held otherwise. Mr. Justice Holmes, answering the government's contention, stated:

> It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.[35]

Since Holmes also held that the former judgment was a judgment on the merits, *Oppenheimer* purports to represent an application of res judicata in the strict sense of a judgment on the same cause of action operating as a bar. Inasmuch as a judgment based on the statute of limitations is not one on the merits in the sense that it is not a determination of the guilt or innocence of the accused, a better view of *Oppenheimer* is that it really represents an application of the doctrine of direct estoppel.[36]

The Supreme Court subsequently indicated that collateral estoppel could be utilized in criminal procedure,[37] but it was not

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[33] Since jeopardy had not attached at the prior proceedings, there was no question of double jeopardy. Since the same offense or "cause of action" was involved, the doctrine of collateral estoppel was inapplicable.

[34] 242 U.S. at 87.

[35] *Ibid.* Holmes thus placed the emphasis on the individual rights enjoyed by a defendant when he is prosecuted by the state rather than on the public policy that there be an end to litigation. See Hoag v. New Jersey, 356 U.S. 464, 470 (1958):

> As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation.

[36] See note 27 *supra.*

[37] United States v. Adams, 281 U.S. 202 (1930). In that case the accused entered a plea of former acquittal to a related but separate offense. Mr. Justice Holmes stated:

> It is obvious that technically the plea was bad because the offense alleged was a different offense. . . . But although not technically a former acquittal, the judgment was conclusive upon all that it decided. United States v. Oppenheimer, 242 U.S. 85.

until 1948 that the Court squarely applied that doctrine. In *Sealfon v. United States* [38] the court pointedly remarked:

> It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. . . . Thus, with some exceptions, one may be prosecuted for both crimes. . . . But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States* v. *Adams*, 281 U.S. 202, 205.[39]

B. *APPLICATION OF THE DOCTRINE*

In the practical application of the doctrine of collateral estoppel we are concerned with two questions: first, what the prior judgment determined; and second, how that determination bears on the subsequent case. An examination of each question will now be conducted.

1. *What the First Judgment Determined*

Consider again the *Hoag* case. After having been acquitted of the first three robberies on the sole defense of alibi, the defendant asserted that the government could not relitigate the question of his presence at the scene of the crime at his trial for the fourth robbery. The New Jersey Supreme Court refused to apply collateral estoppel on the ground that it could not ascertain what the previous acquittal had determined, other than a failure of proof.[40] Other courts have come to this same conclusion and on such occasions have refused to apply the doctrine.[41]

But generally an acquittal has some meaning other than failure of proof. In other words, it should be possible to ascertain what facts have been determined by the finding of not guilty. As noted in *Sealfon*, the answer "depends upon the facts adduced at each

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[38] 332 U.S. 575 (1948).

[39] *Id.* at 578. Although the Court talked in terms of res judicata, there is no doubt that it was applying the collateral estoppel aspects of res judicata. Earlier federal cases had already recognized and applied the doctrine. See, *e.g.*, United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943); United States v. Carlisi, 32 F.Supp. 479 (E.D.N.Y. 1940); United States v. Meyerson, 24 F.2d 855 (S.D.N.Y. 1928). The point is now well settled. See Hoag v. New Jersey, 356 U.S. 464, 470–71 (1958); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955).

[40] State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958).

[41] See, *e.g.*, People v. Rogers, 102 Misc. 437, 440, 170 N.Y. Supp. 86, 88 (Sup. Ct. 1918), *aff'd*, 184 App. Div. 461, 171 N.Y. Supp. 451 (1st Dep't 1918), *aff'd*, 226 N.Y. 671, 123 N.E. 882 (1919).

trial and the instructions under which the jury arrived at its verdict at the first trial." [42]

Thus the previous record of trial must be examined to learn what facts were presented to the jury for its determination and what law the jury had to apply to those facts. The problem, of course, is that juries may decide issues for the "right" reason, for the "wrong" reason or for no reason at all. As Mr. Justice Frankfurter noted in the *Green* case:

> Every trial lawyer and every trial judge knows that jury verdicts are not logical products, and are due to considerations that preclude accurate guessing or logical deduction.[43]

How then can one decide what the jury has determined? Polling the jury is no solution.[44] Several commentators have suggested that use of the special verdict might minimize the difficulties of ascertaining what was determined by the first judgment.[45] Such a procedure, however, could well result in an impairment of the right to trial by jury.[46]

Sealfon, however, does stand for the proposition that it is possible to determine what issues have been decided if the matter is considered "in a practical frame and viewed with an eye to all the circumstances of the proceedings." [47] In other words, the previous acquittal must be considered as having some significance.[48] The approach adopted by the federal courts is to apply a presumption of rationality to the prior judgment and arrive at the most reasonable explanation for the acquittal.[49]

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[42] 332 U.S. at 579.

[43] 355 U.S. at 214 (dissenting opinion). See Hoag v. New Jersey, 356 U.S. 464, 472 (1958); Dunn v. United States, 284 U.S. 390, 393 (1932).

[44] See Stein v. New York, 346 U.S. 156, 178 (1953), where it was noted that post trial inquiries would operate to destroy the frankness and freedom of discussion so essential to the jury system.

[45] See, *e.g.*, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 876 (1952); Comment, 25 BROOKLYN L. REV. 33, 36–38 (1958). The present federal rules make no provision for special jury verdicts. FED. R. CRIM. P. 31. *Cf.* FED. R. CRIM. P. 23(c).

[46] Stein v. New York, 346 U.S. 156, 178 (1953).

[47] 332 U.S. at 579.

[48] See Hoag v. New Jersey, 356 U.S. 464, 476 (1958), where Chief Justice Warren in his dissenting opinion referred to the "manifest legal significance of a jury's verdict." *Cf.* Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12, 15–19 (1957), where Professor Gershenson spoke in terms of a "meaningful acquittal."

[49] See Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960), where the authors state the federal rule as follows:

The fact that juries are not necessarily rational need not deter us. The law is not concerned with the reasoning of individual jurors but with the result of their cumulative effort. It is the policy of the law to consider the verdict as the product of a "reasonably prudent" jury, if possible. By thus according a presumption of rationality to the prior acquittal, it is possible in the great majority of cases to ascertain what the first judgment determined.

2. *Effect on Second Case*

In order to preclude the relitigation of any issue in civil law, it must be shown that the issue (1) is identical with an issue in the previous case, (2) was actually litigated and determined in the previous case, and (3) was necessary to the prior judgment.[50]

The reason for the first requirement is self-evident. If the issue at the second trial were not the same as the one decided at the first trial, there would be no logical basis for precluding subsequent litigation of that issue. The rationale of the second requirement is also readily apparent since it is only in the case of res judicata in the strict sense of merger and bar that all issues whether litigated or not are concluded. In collateral estoppel only those issues actually litigated are foreclosed. The third requirement means only that incidental and immaterial issues are not precluded—only those essential to the prior judgment.

The *Restatement of Judgments* in its enunciation of the doctrine of collateral estoppel incorporates all three requirements:

> Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .[51]

These requirements, as set forth above, would seem to narrow the scope of collateral estoppel sufficiently to protect both parties to the suit. An element of confusion, however, has been introduced in the form of a distinction between "evidentiary" and "ultimate" facts. In essence, an "ultimate" fact is one essential to the right of action, while an "evidentiary" fact is one necessary

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> [T]he court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. [Footnotes omitted.]

[50] See Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1171 (1961).

[51] RESTATEMENT, JUDGMENTS § 68(1) (1942). See section 70 of the *Restatement* as to questions of law.

to prove an ultimate fact. In the leading case of *The Evergreens v. Nunan*[52] Judge Learned Hand held the prior judgment conclusive as to ultimate facts determined thereby, but not as to evidentiary facts. Hand held additionally that, without regard to whether the facts determined in the first trial are ultimate or evidentiary, those determinations are conclusive only with respect to ultimate facts in the second trial.[53]

Hand's first requirement that the estoppel be limited to ultimate facts in the first case would appear to be unnecessary in view of the requirement that the fact be necessarily determined by the first judgment. A fact *necessary* to the first judgment is usually an ultimate fact. Even if it should be an evidentiary fact, the requirement of necessity would insure that the fact in issue were fully litigated between the parties; this is the real basis for Hand's requirement.

By his second requirement that the doctrine be limited additionally to ultimate facts in the second trial, Hand was apparently attempting to decrease the hazards of a lawsuit by eliminating surprise at the second trial. The thrust of this requirement would be that collateral estoppel would, for all practical purposes, be limited to those cases arising out of the same transaction or to those where it could be foreseen that the issues would be relitigated.[54]

In the procedural application of res judicata much confusion has been generated through failure to distinguish between the effect of a judgment as an absolute bar to subsequent proceedings and as an estoppel only as to particular facts. A prior judgment can operate as a complete bar to a second action only when the causes of action are the same.

> On the other hand, where the causes of action are different, the judgment cannot operate as a bar even though it may defeat the second action because it conclusively and negatively adjudicates some fact essential to maintain the latter.[55]

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[52] 141 F.2d 927 (2d Cir. 1944), *cert. denied*, 323 U.S. 720 (1944).

[53] *Id.* at 930–31. Judge Hand actually spoke in terms of "mediate data" and "ultimate facts," but the meaning is the same. The *Restatement* in a comment to § 68 also draws a distinction between evidentiary and ultimate facts (or "facts in issue," to use the language of the *Restatement*), indicating that only those facts which were ultimate at the first trial would be conclusive at the second. It does not, however, provide that only facts ultimate in the second trial would be conclusive thereat.

[54] While the 1948 supplement of the *Restatement* adopted Hand's definition of "ultimate facts" and "mediate data," it did not change the statement of the rule itself, which does not require that the fact be essential to the second cause of action. RESTATEMENT, JUDGMENTS § 68, comment p (Supp. 1948).

[55] 2 FREEMAN, JUDGMENTS, § 677, at 1429 (5th ed. 1925). *Accord*, Cromwell v. County of Sac, 94 U.S. 351 (1876).

To be a bar the former adjudication must have been pleaded at common law, while in the latter "there is no reason why it should be differentiated from any other evidentiary matter so far as the pleading of it is concerned, even though it be conclusive of the particular fact which it evidences." [56]

Although the modern codes have abolished much that was unnecessary and cumbersome in pleading and in other procedural aspects of the trial,[57] a distinction must still be maintained between the effect of res judicata and collateral estoppel. Thus, while a second and different cause of action might be defeated by a former judgment because it conclusively adjudicated some essential fact or issue involved in the latter, a judgment can never operate as a *bar* of a different cause of action. Failure to draw the distinction has produced confusion in the civil law.[58] Some of the confusion has been carried over into criminal law.

In criminal cases at common law, the special plea in bar was used to raise such defenses as *autrefois convict* and *autrefois acquit*. Res judicata in the strict sense of merger and bar was largely superfluous in view of the doctrine of double jeopardy. As a rule of evidence, collateral estoppel would not be pleaded or made the subject of a preliminary motion but would be properly raised by means of an objection at the time the government attempted to relitigate the facts in question. In certain cases, the former judgment might preclude the relitigation of a fact essential to a conviction at the second trial. In such cases, collateral estoppel, although a rule of evidence, would operate as a complete defense.

Thus it became common in such cases to permit collateral estoppel to be raised by a motion to quash.[59] On the other hand, if the

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[56] 2 FREEMAN, JUDGMENTS, § 798, at 1691 (5th ed. 1925). *Accord*, Southern Pac. R.R. v. United States, 168 U.S. 1 (1897), where the court said at p. 57:

> [T]he judgment in the prior suit—the present suit being on a different cause of action—could not be pleaded as an absolute bar arising upon the face of the record, but could be used as *evidence* to support the contention. . . .

[57] *E.g.*, under the Federal Rules of Civil Procedure res judicata is pleaded as an affirmative defense. FED. R. CIV. P. 8(c). No distinction is made between res judicata as such and collateral estoppel. Res judicata may also be made the basis for a motion for summary judgment. FED. R. CIV. P. 56. If collateral estoppel is to be used as a bar, in the sense that it would preclude the relitigation of a fact essential to the second case, a motion for summary judgment would be the more appropriate vehicle. See Chesapeake Industries v. Wetzel, 265 F.2d 881 (6th Cir. 1959).

[58] See Annot., 88 A.L.R. 574 (1934) and 120 A.L.R. 8, 55–75 (1939).

[59] See, *e.g.*, United States v. Meyerson, 24 F.2d 855 (S.D.N.Y. 1928); United States v. Morse, 24 F.2d 1001 (S.D.N.Y. 1926); United States v. Clavin, 272 Fed. 985 (E.D.N.Y. 1921); United States v. Rachmil, 270 Fed. 869 (S.D.N.Y. 1921).

fact to be precluded would not be essential to a conviction in the second case, the indictment would not be quashed, but the defendant would be able to raise the evidentiary question at the trial.[60] Under the present federal rules, pleas in bar and motions to quash have been abolished. Defenses and objections which could have been raised thereby are now raised by a motion to dismiss or to grant appropriate relief in accordance with Rule 12.[61]

Collateral estoppel, however, is essentially a rule of evidence regardless how it is raised. It has been thought by some that *Sealfon* stands for a contrary proposition.[62] But that case stands for the proposition that collateral estoppel is applicable to the trial of criminal cases as well as to civil cases. When, as in *Sealfon*, the defendant attempts to use collateral estoppel to bar a second trial, the crucial test is obviously whether the particular fact is essential to a conviction at the second trial. It is senseless to attempt to extract from that situation any rule that collateral estoppel cannot be used simply to preclude the relitigation of certain facts which might not be essential to a conviction at the second trial.[63] That issue was never presented to the Court in *Sealfon* and was not decided by it either expressly or by implication.[64]

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[60] United States v. Morse, *supra* note 59.

[61] FED. R. CRIM. P. 12.

[62] See, *e.g.*, United States v. Perrone, 161 F.Supp. 252, 258 (S.D.N.Y. 1958):

> It is quite clear from *Sealfon* and subsequent cases applying the doctrine of res judicata in criminal cases that, in order for the doctrine to apply, there must have been a definite determination of an issue favorable to the defendant in the prior trial, and such determination must be inconsistent with the guilt of the defendant in the subsequent proceeding.

Accord, United States v. Cowart, 118 F. Supp. 903, 906 (D.D.C. 1954).

[63] It is to be noted that in *Sealfon* Justice Douglas cited United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943), to support his conclusion that collateral estoppel applied to criminal proceedings. 332 U.S. at 578. This is particularly revealing inasmuch as that case is an example of the use of collateral estoppel to preclude relitigation of facts which were not essential to a conviction at the second trial.

[64] The dissenting opinion of Justice Douglas in United States v. Williams, 341 U.S. 70, 87 (1951), is not to the contrary. In stating that *Sealfon* did not apply to *Williams* because the prior acquittal did not preclude any fact "upon which conviction of the record offense depended," Douglas was only answering Justice Black's contention in his separate opinion that the prior determination was a bar. *Id.* at 95. He was only saying that collateral estoppel could not be used to effect a bar in that case—not that it could not be used as a rule of evidence in appropriate cases. *Cf.* Yates v. United States, 354 U.S. 298, 337–38 (1957), where Justice Harlan, in an opinion concurred in by Chief Justice Warren and Justices Frankfurter and Burton, indicated by way of dictum that the doctrine of collateral estoppel might not apply to evidentiary facts in the second case.

It has been seen that the increase in the number of offenses that could arise out of a single course of criminal conduct together with an overly-strict interpretation of "same offense" has largely nullified the effectiveness of the doctrine of double jeopardy. In order to foreclose substantially repetitious litigation permitted by the traditionally hypertechnical interpretation of double jeopardy, courts have resorted to the doctrine of collateral estoppel. It would be unreasonable to introduce collateral estoppel for this purpose and then to qualify its application with equally stringent requirements. To limit the doctrine solely to the situation where it operates as a complete defense is to deprive it of much of its vitality.

An excellent analysis of this problem is contained in a significant 1961 case from the Second Circuit.[65] The case concerned an appeal from a conviction on four counts involving the burglarizing of two post offices.[66] The defendant, Kramer, had previously been acquitted on all eight counts of an indictment charging him with various substantive crimes (including burglary and larceny) arising from the same burglaries. At the trial he moved to dismiss on the grounds of double jeopardy[67] and interposed appropriate objections to testimony concerning the burglaries identical with that given at the first trial on the grounds of collateral estoppel. The objections were overruled, and the government was permitted to present the testimony.

On appeal the government contended, quoting the language of *Perrone*,[68] to the effect that the principle of collateral estoppel applies only if the earlier determination "must be inconsistent with the guilt of the defendant in the second proceeding." [69] The point was crucial inasmuch as the determination that Kramer did not participate in the burglaries, although necessary to the first judgment, was not (under the facts of the case) inconsistent with guilt of conspiracy to receive stolen property or of the substantive offense of receiving stolen property.

Judge Friendly, speaking for the court, held that the doctrine of collateral estoppel should not be so narrowly construed that it would operate in effect only as a bar to a second prosecution.

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[65] United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

[66] Counts I and II, conspiracy to break and enter a post office with intent to steal; Count III, conspiracy to receive property from post offices knowing it to have been stolen; Count IV, substantive offense of receiving property from post offices knowing it to have been stolen.

[67] This was properly denied.

[68] United States v. Perrone, 161 F.Supp. 252 (S.D.N.Y. 1958).

[69] 289 F.2d at 915. The Government also contended that the evidentiary/ultimate fact test would require the same result.

> [T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, . . . and still longer before the proliferation of statutory offenses deprived it of so much of its effect. . . . *The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar.*[70]

With respect to the government's contention that Judge Hand's ultimate-fact test would permit the relitigation of the fact of the burglaries, Judge Friendly specifically declined to extend the *Nunan* case to criminal procedure.[71]

Having decided that the erroneous admission of the testimony was prejudicial, the court was then faced with the problem of appropriate disposition of the cas . Granting that the burglary acquittal was not *necessarily* inconsistent with a conviction of a conspiracy to burglarize, the court nevertheless felt compelled to direct a judgment of acquittal with respect to the first two conspiracy counts since "the core of the prosecutor's case was in each case the same."[72] With respect to the other two counts, however, the court concluded that there was sufficient additional evidence in the record which might tend to prove Kramer guilty of receiving the stolen property or agreeing to do so. As to those counts, the court therefore ordered a new trial "at which the court will exclude all evidence which, if believed, would necessarily show Kramer to be a principal or an aider or abetter in the burglaries."[73]

The significance of *Kramer* lies not so much in the fact that one circuit court has liberally construed the doctrine of collateral estoppel. Other courts have done that many times. The significance of *Kramer* lies rather in the fact that Judge Friendly has placed the doctrine in its proper perspective. Similar cases, at least in the post-*Sealfon* era, are conspicuous by their absence. Whatever the reason for the doctrine in civil cases, the primary reason that res

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[70] *Id.* at 916 (emphasis added).

[71] *Nunan*, like *Kramer*, was a Second Circuit case. As in civil cases it would appear to be sufficient if the issue to be precluded were *necessary* to the first judgment. Hand's second requirement that the fact be ultimate in the second prosecution would limit the use of collateral estoppel to those cases where it would operate as a complete bar. Such a limitation in criminal law is neither necessary nor desirable.

[72] 289 F.2d at 919, citing Sealfon v. United States, 332 U.S. 575, 580 (1948).

[73] *Id.* at 921. *Accord*, Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); United States v. Simon, 225 F.2d 260 (3d Cir. 1955).

judicata was introduced into criminal law was the strict construction of the double jeopardy clauses. Judge Friendly has reminded us that the rule against double jeopardy was developed judicially to meet the abuses of the day. History has a habit of repeating itself.

It is true that collateral estoppel provides its strongest protection in the situation where it operates like a bar. In effect it acts as a substitute 1or double jeopardy by precluding the accused from being twice vexed, if not for the same offense, at least for substantially the same offense. But the doctrine also serves to limit litigation of other issues previously determined. In those cases the prosecution may be left with so little in the way of a *prima facie* case that a motion for directed verdict will be granted.

The doctrine of collateral estoppel, though not acting like a bar, can, to a greater or lesser extent, provide a valuable protection to a person who finds himself about to run the gantlet a second time. The Supreme Court has demonstrated that as far as federal cases are concerned, it is willing to examine the prior case "with an eye to all the circumstances of the proceedings," to ascertain what facts were necessarily determined by the judgment in that case, and to preclude the relitigation of that determination at a second trial.[74] The full reach of the court's authority in this area has not yet been decided. Subject to a liberalization of the "same evidence" test of double jeopardy, there is good reason to believe that the Court will exercise its authority to the fullest in order to preclude the government from "attempting to wear the accused out by a multitude of cases with accumulated trials."[75]

3. *Perjury*

False testimony of the accused at his prior acquittal occupies a unique position in the field of collateral estoppel. That doctrine, if applicable, will always have the effect in such cases of operating as a complete defense. If the accused, for example, testified that he was not at the scene of the crime and was thereby acquitted, and this allegedly false statement were made the basis for a perjury

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[74] Sealfon v. United States, 332 U.S. 575, 579 (1948). Not having the same corrective power over state courts, the Supreme Court has indicated a reluctance to find the same protection inherent in the due process clause of the fourteenth amendment. Hoag v. New Jersey, 356 U.S. 464 (1958).

[75] Palko v. Connecticut, 302 U.S. 319, 328 (1937). It is recognized, however, that res judicata normally provides no protection where the accused has been convicted at the first trial and is now being tried for another separate offense arising out of the same transaction. See, *e.g.*, Ciucci v. Illinois, 356 U.S. 571 (1958).

charge, the falsity of the testimony would be essential to a conviction of perjury.

Most state courts which have considered the problem have concluded for reasons of public policy that collateral estoppel should not be applicable to perjury cases.[76] Federal courts, on the other hand, have generally applied the doctrine in this area.

As always, a distinction must be made between those facts which were *necessarily* determined by the previous judgment and those which were merely collateral to the judgment. Early federal cases, therefore, recognized that a prosecution for perjury would lie with respect to an issue that was not necessarily determined by the first judgment. These same cases, although concluding that an accused could not be prosecuted for perjury based on his allegedly false testimony at a previous acquittal where the fact in question *was* necessarily determined by the acquittal, often employed language that sounded more in double jeopardy than in res judicata.[77] To say that an accused cannot be tried for perjury for falsely denying his

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[76] See Annot., 37 A.L.R. 1290 (1925); 147 A.L.R. 991, 1000–01 (1943). Perhaps the best statement of the underlying reason for this conclusion is found in the leading case of Jay v. State, 15 Ala. App. 255, 261, 73 So. 137, 139, *cert. denied*, 198 Ala. 691, 73 So. 1000 (1916):

> The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation. . . . Keeping in view the basic principle and underlying reason—public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res judicata, yet, on the other it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial.

[77] See, *e.g.*, Chitwood v. United States, 178 Fed. 442, 443–44 (8th Cir. 1910).

> A person acquitted of a crime cannot be again tried for it under the guise of a charge of perjury. . . . Nor can the government reassert guilt of the first offense to sustain a charge of perjury in securing an acquittal.
>
> We do not mean that an acquittal necessarily prevents a subsequent conviction for perjury committed by the accused at the trial. But if the particular testimony alleged to be false is as general and broad as the charge of the crime—in other words, a denial of guilt—a trial for perjury is virtually a second trial of the prior case. . . . If, however, the false swearing, like in the case at bar, is as to a subordinate evidential matter, and not a mere denial of the entire charge, an indictment for perjury may be upheld, notwithstanding the prior acquittal.

Accord, Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); Youngblood v. United States, 266 Fed. 795 (8th Cir. 1920); United States v. Butler, 38 Fed. 498 (E.D. Mich. 1889). *But see* Kuskulis v. United States, 37 F.2d 241 (10th Cir. 1929); Allen v. United States, 194 Fed. 664 (4th Cir. 1912) (prosecution for perjury barred only where same evidence presented at previous trial).

guilt at a previous trial is to state the obvious. The government of course should not be able to relitigate the guilt of the accused following an acquittal. But the doctrine of collateral estoppel is much broader in scope. The government is not only precluded from relitigating the *guilt* of the accused, it is also foreclosed from relitigating any *fact* which was necessarily determined in the defendant's favor at the first trial.

Recent cases, however, have indicated that the federal courts will apply the doctrine of collateral estoppel to *all* facts which were necessarily determined by the prior acquittal. In the case of *Wheatley v. United States*,[78] the accused was acquitted on charges of conspiracy to carry on a wholesale liquor business without paying applicable taxes based on an indictment charging that he aided and abetted certain bootleggers by affording protection and receiving money therefor. The court held that this prior acquittal barred his subsequent prosecution for perjury based on his allegedly false testimony that he did not receive any payoffs. The court recognized that a prosecution for perjury is not barred by the simple fact of acquittal at the trial in which the false testimony is given. It concluded, however, that under the particular facts of this case the government, as in the *Sealfon* case, was attempting to prove an agreement " 'which at each trial was critical to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent.' "[79]

A somewhat stricter approach is found in *Adams v. United States*.[80] In that case the accused was first charged with unlawful possession of moonshine whiskey. The prosecution evidence tended to show, *inter alia*, that the defendant was in an automobile that was stopped by police officials in Florida on a certain date. He testified, as did several other witnesses, that he was at a birthday party in Georgia on the night in question. Upon being acquitted of that charge, he was then indicted for perjury based on his allegedly

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[78] 286 F.2d 519 (10th Cir. 1961).

[79] *Id.* at 521, citing Sealfon v. United States, 332 U.S. 575, 580 (1948). *Cf.* United States v. Williams, 341 U.S. 58 (1951). The accused in that case was acquitted of aiding and abetting a fellow police officer in coercing prisoners to sign confessions. He was subsequently charged with perjury for falsely testifying that he did not see the abuses perpetrated on the prisoners. He was convicted and the Supreme Court affirmed on the basis that the previous acquittal did not necessarily determine that the defendant did not *see* the abuses in question.

[80] 287 F.2d 701 (5th Cir. 1961).

false testimony that he was at the party in Georgia.[81] Adams contended that since the first jury believed his alibi testimony, the government was precluded from relitigating the issue of whether or not he was at the Georgia party.

The court recognized the applicability of collateral estoppel to criminal law in general and to perjury in particular. It concluded, however, that the only fact *necessarily* determined by the first judgment was that the defendant was not in the car in Florida on the night in question. It did not necessarily determine that he was at the party in Georgia. The court accordingly held that the government was not precluded from litigating that point. This is a rather fine distinction but nonetheless correct in view of the requirement that the fact be necessarily determined by the first judgment.[82]

Notwithstanding its narrow holding, this case, together with *Wheatley*, does indicate that the federal courts will apply collateral estoppel to perjury prosecutions with respect to those subordinate issues which were necessarily determined by a prior acquittal.

IV. DOUBLE JEOPARDY IN THE MILITARY SYSTEM

A. *HISTORICAL DEVELOPMENT OF THE DOCTRINE*

A prohibition against being tried twice for the same offense was first enacted into military law in 1806[83] and has been periodically reenacted in one form or another down to the present day.[84] Whether the double jeopardy provisions of the fifth amendment are applicable as such to the military has been the subject of some

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[81] The factual situation has been simplified. The exact sequence of events is more complex. The defendant was first charged with unlawful possession of the whiskey. He testified at that trial as indicated. The prosecution resulted in a mistrial. Shortly thereafter, the perjury indictment was returned. He was next tried again on the unlawful possession charge and acquitted. Finally he was tried for perjury (and subornation of perjury). The appellate court treated the acquittal in the second possession case as a jury determination of the first trial as well.

[82] It would appear that if the perjury indictment in this case had alleged that the accused testified falsely about being in the car in Florida, the court would have held the Government to be estopped from relitigating that issue.

[83] "[N]o officer, non-commissioned officer, soldier or follower of the army shall be tried a second time for the same offense." Article of War 87, Act of April 10, 1806, ch. 20, § 1, 2 Stat. 369.

[84] Article of War 102, REV. STAT. § 1342 (1875); Article of War 40, Act of August 29, 1916, ch. 418, § 3, 39 Stat. 657; Article of War 40, Act of June 4, 1920, ch. 227, § 1, 41 Stat. 795, UNIFORM CODE OF MILITARY JUSTICE, Article 44, Act of 5 May 1950, ch. 169, § 1, 64 Stat. 122, reenacted in 1956 as 10 U.S.C. § 844, Act of August 10, 1956, ch. 1041, § 1, 70A Stat. 52.

debate.[85] The Supreme Court has never held that the bill of rights in general or the double jeopardy provisions in particular are applicable as such to the military,[86] and the point has never been squarely presented to the Court of Military Appeals.[87] However, as will be presently noted, the accused is so extensively protected by statutory enactment and regulatory implementation that the problem of possible application of the double jeopardy provisions of the fifth amendment is somewhat academic and of no particular moment unless and until some of these rights are removed by congressional action—a rather unlikely event.

The doctrine of double jeopardy in the military arose out of the common law pleas of *autrefois convict* and *autrefois acquit*.[88] Under the earliest statutory concept of double jeopardy—"No [person] shall be tried a second time for the same offense."—there was no trial and hence no jeopardy until the verdict.[89] The doctrine of waiver was then invoked to permit a new trial upon request of the accused following a disapproval of an erroneous conviction.[90] Furthermore, since the accused would not have been in jeopardy until the verdict, the government was permitted, before verdict, to withdraw charges from one court-martial and submit them to another without apparent limitation.[91]

The jeopardy provisions remained substantially unchanged until 1920 when the following language was added:

> No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the

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[85] On the question of the Bill of Rights in general see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) and Wiener, *Courts-Martial and The Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958). With respect to double jeopardy Colonel Wiener concludes that the inclusion of the original double jeopardy provision in the Articles of War reflected an application of common law principles rather than a constitutional requirement.

[86] See, *e.g.*, Reid v. Covert, 354 U.S. 1, 37 (1956) and cases cited therein. *Cf.* Wade v. Hunter, 336 U.S. 684 (1949), where the Court assumed that the double jeopardy provisions of the fifth amendment applied to the military but concluded that such provisions did not preclude the withdrawing of charges from one court-martial which had heard all of the evidence and referring them to another where the wartime tactical situation so required.

[87] See United States v. Ivory, 9 USCMA 516, 522, 523, 26 CMR 296, 302, 303 (1958), where the two concurring judges concluded that the military accused has the benefit of the double jeopardy provisions of the Constitution. See also United States v. Zimmerman, 2 USCMA 12, 6 CMR 12 (1952).

[88] WINTHROP, MILITARY LAW AND PRECEDENTS, 259 (2d ed. 1920 reprint).

[89] *Id.* at 260.

[90] *Id.* at 268, 453.

[91] *Id.* at 262–63.

> sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action on the case.[92]

The effect of this addition was that the accused was not placed in jeopardy "until acquittal or final conviction, and final conviction [occurred] only after final review of the case . . . ."[93]

Article of War 40 remained in effect until the adoption in 1950 of the Uniform Code of Military Justice, Article 44 of which provides as follows:

> (a) No person may, without his consent, be tried a second time for the same offense.
>
> (b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.
>
> (c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.[94]

It will be noted that the only substantial change between Article 44 and Article of War 40 appears in Article 44(c). It had become apparent in 1949 by virtue of *Wade v. Hunter*[95] that a constitutional issue could well be involved with respect to the broad authority of the government to withdraw charges. The result was Article 44(c).

The effect of Article 44(c) is to foreclose any other prosecution for the same offense once the trial has reached a certain point—even though there is no "final determination" such as an acquittal, a conviction, or final review. In the military this turning point occurs upon reception of evidence on the merits.[96] Although Judge

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[92] Article of War 40, Act of June 4, 1920, ch. 227, § 1, 41 Stat. 795.

[93] ACM 8951, Flegel, 17 CMR 710, 717 (1954).

[94] 10 U.S.C. § 844. Future reference will be to the article of the Code (UCMJ) only.

[95] 336 U.S. 684 (1949).

[96] See United States v. Wells, 9 USCMA 509, 26 CMR 289 (1958); LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 88. *But see* United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958) (opinion of Judge Latimer); United States v. Padilla, 1 USCMA 603, 608, 5 CMR 31, 36 (1952) (opinion of Judge Brosman). Judge Brosman also concluded that for jeopardy to attach the trial court must have had jurisdiction. *Id.* at 606, 5 CMR at 34 (dictum). *Accord*, Grafton v. United States, 206 U.S. 333 (1907) (dictum). In federal practice jeopardy attaches as of the time the jury is impaneled and sworn or, in non-jury cases, when the government presents evidence on the general issue. McCarthy v. Zerbst, 85 F.2d 640 (10th Cir. 1936) (dictum), *cert. denied*, 299 U.S. 610 (1936). See Kepner v. United States, 195 U.S. 100, 128 (1904) (dictum).

Latimer[97] and Judge Brosman[98] have taken the position that there is no trial and thus no jeopardy until completion of appellate review, this view seems to be based on a consideration of Article 44(b) out of context. The immediate predecessor of Article 44(b) undoubtedly had that effect. But Article 44(b) has been modified by Article 44(c) with the result that the former is now limited to the appellate processes.[99] Thus, if a case is terminated before findings, Article 44(c) applies.[100] But once a case is in the appellate stage, Article 44(b) comes into play and provides that a conviction does not become final until review is complete.[101]

Article 44(c), of course, was not designed to eliminate completely the withdrawal of charges by the government, but rather to prevent retrial of an accused where the original trial was terminated because the prosecution had not properly prepared its case.[102] Charges may still be withdrawn by the government for good cause, and mistrials may be granted by the law officer in appropriate cases.[103]

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[97] United States v Ivory, *supra* note 96.

[98] United States v. Padilla, 1 USCMA 603, 5 CMR 31 (1952).

[99] United States v. Wells, 9 USCMA 509, 512, 26 CMR 289, 292 (1958) (dictum).

[100] An interesting question is presented if charges are withdrawn after findings and before sentence. A strict reading of Article 44(c) could lead to the conclusion that the accused could not claim former jeopardy since the proceedings were not terminated "before a finding." This is doubtful, however. The legislative intent behind Article 44(c) appears to be that once jeopardy has attached—by presentation of evidence by the prosecution—the charges may thereafter be withdrawn only by reason of "manifest necessity" in the interests of justice. See *Hearings on S. 857 Before a Subcommittee of the Committee on Armed Services, United States Senate*, 81st Cong., 1st Sess., 167–70, 321–25 (1949); S. REP. No. 486, 81st Cong., 1st Sess., 19–20 (1949). See also Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* United States v. Sabella, 272 F.2d 206 (2d Cir. 1959). If charges are withdrawn after findings (of guilty), jeopardy having attached, there would be no authority to retry the accused unless the withdrawal was for reasons of "manifest necessity."

Judge Latimer has come to a different conclusion (United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958)), but it must be remembered that Latimer believed jeopardy did not attach until completion of appellate review. See Kates, *Former Jeopardy—A Comparison of the Military and Civilian Right*, 15 MIL. L. REV. 56 (1962). The situation should arise infrequently at best. Even then, assuming there is good cause for withdrawing the charges, they could be referred to another court for sentencing proceedings only. The same procedure could be followed here as in the case of a rehearing on the sentence only. See United States v. Miller, 10 USCMA 296, 27 CMR 370 (1959). *But see* Jackson v. Taylor, 353 U.S. 569, 579, *reh. denied*, 354 U.S. 944 (1957).

[101] Appellate review under the Code is automatic. UCMJ, Arts. 60–71. Where findings and sentence have been set aside on review, either a rehearing is ordered or the charges are dismissed. UCMJ, Arts. 63, 66, 67.

[102] United States v. Stringer, 5 USCMA 122, 127, 17 CMR 122, 127 (1954).

[103] See Kates, *supra* note 100, at 55–62.

In summary, Article 44 may be restated in terms of jeopardy thusly: No person may, without his consent, be twice placed in jeopardy for the same offense. Jeopardy attaches upon presentation of evidence on the merits. The accused may be retried, however, in those cases which are terminated by the convening authority or the law officer because of "manifest necessity" in the interests of justice. Once jeopardy has attached, it continues until a finding of guilty has been finally affirmed on review. It will be noted that this language embodies the "continuing jeopardy" theory that Mr. Justice Holmes espoused in his *Kepner* dissent [104] and as such permits rehearings following automatic review without involving any question of waiver.

With this background in mind it is appropriate to examine the rights that a military accused has vis-a-vis his civilian counterpart in a federal prosecution. A military accused, of course, may be retried following a reversal of his erroneous conviction.[105] Unlike the federal rule,[106] there is no question of waiver. The logical extension of this military concept of jeopardy would necessarily lead to Holmes' conclusion in *Kepner* that the government should be able to appeal an acquittal since under the "continuing jeopardy" theory "the jeopardy is one continuing jeopardy from its beginning to the end of the cause."[107] The point, however, has been rendered moot inasmuch as the review provisions of the Code contemplate that such review will extend only to those offenses of which the accused has been found guilty.[108] Furthermore, Article 63(b) by specifically providing that on rehearing an accused "shall not be tried for any offense of which he was found not guilty by the first court-martial . . . ," anticipated the result in the *Green*[109] case by several years.

Thus, by virtue of statutory enactment the military accused is accorded rights substantially similar to those enjoyed by defendants in federal prosecutions—the latter rights having been developed judicially over many years and not without dissenting voices. A military accused is further protected by a provision that there may be no rehearing if the conviction is set aside for lack of

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[104] 195 U.S. 100, 134 (1904). "[A] man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." *Ibid.*

[105] See note 101 *supra.*

[106] United States v. Ball, 163 U.S. 662 (1896).

[107] 195 U.S. at 134.

[108] UCMJ, Arts. 64–69.

[109] Green v. United States, 355 U.S. 184 (1957).

evidence,[110] and by the provision that punishment imposed at the rehearing is limited to that imposed at the original hearing.[111]

One area that might cause some concern is that wherein the government in effect is permitted to appeal the decision of the board of review[112] to the Court of Military Appeals.[113] This problem was presented to the court in *United States v. Zimmerman*.[114] The court, per Judge Brosman, held there was no question of former jeopardy since the military employs a "unitary" theory of appellate review whereby once a case reaches the board of review it enters the unitary appellate sphere and not until all appellate treatment has been completed, "and the conviction affirmed, has the accused been placed in jeopardy."[115]

Judge Brosman attempted to further justify the military practice of certification by analogy to the federal practice of prosecution appeals from intermediate appellate courts. In doing so, of course, it became necessary to get around the waiver requirements of the federal system which are not present in the military.[116] He accomplished this by treating automatic review by a board of review as tantamount to intermediate appellate review sought by

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[110] UCMJ, Arts. 63(a), 66(d), 67(e). *Cf.* Forman v. United States, 361 U.S. 416 (1960); Sapir v. United States, 348 U.S. 373 (1955).

[111] UCMJ, Art. 63(b). This has been interpreted to mean that where the sentence is reduced at any level, all subsequent proceedings are limited to that sentence. United States v. Jones, 10 USCMA 532, 28 CMR 98 (1959). *Cf.* Stroud v. United States, 251 U.S. 15 (1919) where the Supreme Court held that a defendant in a federal prosecution who appealed his conviction of "murder in the first degree without capital punishment" might, upon retrial, receive the death sentence if again found guilty.

[112] The board of review is an intermediate appellate body, constituted by The Judge Advocate General of each service, which reviews every case in which the sentence, as approved by the convening authority, affects a general or flag officer or extends to death, dismissal of an officer, midshipman or cadet, punitive discharge or confinement at hard labor for one year. UCMJ, Art. 66. In addition, other general court-martial cases may be reviewed by the board of review in accordance with UCMJ, Art. 69.

[113] The United States Court of Military Appeals is an appellate court consisting of three civilian judges appointed by the President. It is the court of last resort for the military. UCMJ, Art. 67. In addition to reviewing those cases wherein the sentence affects a general or flag officer or extends to death, and those board of review cases wherein the court has granted an accused's petition, the Court of Military Appeals also reviews "all cases reviewed by a board of review which The Judge Advocate General orders sent to the Court of Military Appeals for review . . . ." UCMJ, Art. 67(b)(2). The latter provision is the one now being considered.

[114] 2 USCMA 12, 6 CMR 12 (1952).

[115] *Id.* at 16, 6 CMR at 16. As noted previously, Judge Brosman was of the opinion that jeopardy did not attach until completion of appellate review.

[116] Judge Brosman himself admitted that waiver has no place in the military system of automatic review. *Id.* at 20, 6 CMR at 20.

the accused himself. Thus, the argument goes, the accused in effect having requested the appeal, he cannot complain when the government within the limits of the "unitary" system attempts to obtain a record free from error. In other words the accused, having waived his guarantee against double jeopardy, may be subjected to retrial. By employing this line of reasoning, Judge Brosman has demonstrated the futility of what he himself in another connection referred to as comparing "chalk with cheese." [117]

Judge Brosman's conclusion is assuredly the correct one but not for the reasons advanced. The prosecution can "appeal" decisions of the board of review, not because the accused has not yet been placed in jeopardy, but because the jeopardy of the accused which attached at the trial stage is a continuing jeopardy. Futhermore, the automatic review by the board of review is *not* tantamount to an appeal by the accused. He may not even want his conviction reviewed.[118] It is true that the appellate review has a "unitary" aspect to it. But this is because the whole court-martial system—from trial through appellate review—is unitary. That is to say, the military system operates under a theory of continuing jeopardy. Again, Article 44(b) has to be read in connection with Article 44(c).

B. *APPLICATION OF THE DOCTRINE*

The logical inquiry at this point, coinciding with the treatment of federal cases, would be to consider what test the Court of Military Appeals utilizes in determining what constitutes the "same offense" for purposes of successive trials. Interestingly enough, there are no reported cases to provide us with an answer. This is not so strange, however, when one considers that the *Manual for Courts-Martial* [119] provides that charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment." [120] Thus, with compulsory joinder, successive prose-

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[117] United States v. Kelley, 6 USCMA 259, 264, 17 CMR 259, 264 (1954) (concurring opinion).

[118] It is for this reason, if for no other, that the rehearing safeguards have been introduced into the system.

[119] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, promulgated by Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951) (hereinafter referred to as the *Manual* and cited as MCM, 1951, para. ___).

[120] MCM, 1951, para. 30*f*. This provision is tempered by a prohibition against an unreasonable multiplication of charges arising out of a single act or course of conduct. MCM, 1951, para. 26*b*. See Army TJAG letter, JAGJ 1962/8304, 2 April 1952, for comments of The Judge Advocate General, Department of the Army, on unwarranted multiplicity of charges.

cutions are less of a problem in the military than in civilian prosecutions. But while an accused "may be found guilty of two or more offenses arising out of the same transaction, without regard to whether the offenses are separate," [121] the maximum authorized punishment "may be imposed [only] for each of two or more *separate offenses* arising out of the same act or transaction." [122]

The Court of Military Appeals, therefore, has been concerned with the "same offense" not for purposes of successive prosecutions but rather for purposes of maximum authorized punishment at a single trial. In this connection the *Manual* provides that the offenses are separate for punishment purposes "if each offense requires proof of an element not required to prove the other."[123] The *Manual* further provides that lesser included offenses are not separate for purposes of punishment[124] and defines such offenses as follows:

> An offense found is necessarily included in an offense charged if all of the elements of the offense found are necessary elements of the offense charged. An offense is not included within an offense charged if it requires proof of any element not required in proving the offense charged. . . . [125]

Would the Court of Military Appeals, if the situation should arise, adopt the *Manual* test for separate offenses to determine if offenses are the same for purposes of double jeopardy? Although it is difficult to avoid the feeling that the court has decided the multiplicity cases on a more or less *ad hoc* basis, one conclusion is inescapable. While consistently maintaining its adherence to the *Blockburger* rule, the Court of Military Appeals has refused to apply either that rule or the *Manual* rule in a vacuum and instead has adopted a liberal interpretation when justice so requires.

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[121] MCM, 1951, para. 74*b*(4).

[122] MCM, 1951, para. 76*a*(8) (emphasis added).

[123] MCM, 1951, para. 76*a*(8). The drafters of the *Manual* purportedly adopted the so-called *Blockburger* rule for determining separate offenses in order to utilize federal court decisions as precedents. LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1961, 78. The *Blockburger* case provided that "the test to be applied . . . is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). *Accord*, Gore v. United States, 357 U.S. 386 (1958). As stated, of course, the rule is identical with that of the "same evidence" test of double jeopardy. See Gavieres v. United States, 220 U.S. 338, 342 (1911). This is the leading federal case on the "same evidence" test and as such was heavily relied on in *Blockburger*. 284 U.S. at 304. For an excellent analysis of the decisions of the Court of Military Appeals in the multiplicity area, see Youngblood, *Multiplicious Pleading*, 8 MIL. L. REV. 73 (1961).

[124] MCM, 1951, para. 76*a*(8).

[125] MCM, 1951, para. 158.

Thus, rather than conduct a mere mechanical examination of the elements of the offenses, as might be indicated by the *Manual* rule, the court has looked to the evidence offered to prove each offense in order to determine if the offenses are separate.[126]

In like vein, where a single act violated two articles of the Code, the court held the offenses to be the same for punishment purposes even though under a strict application of the *Blockburger* rule the offenses would be separate.[127] In that case the accused was charged with wrongful disposition of military clothing in violation of Article 108, UCMJ, and with larceny of the same clothing in violation of Article 121, UCMJ. Article 108 requires that the property be military, while Article 121 does not; and Article 121 requires proof of a specific intent, while Article 108 does not. Since each offense "requires proof of an additional fact which the other does not," the offenses would appear to be separate within the meaning of *Blockburger*—and for that matter within the same meaning of the *Manual*.

> More critical analysis, however, reveals the differences to be illusory when applied to a situation in which there is but one act by the accused . . . .
>
> From the standpoint of proof, therefore, there is no difference between the two offenses. Evidence sufficient to establish an act of wrongful disposition would be sufficient to prove the accused's intent. . . .
>
> The difference between the sale or other unauthorized disposition provision of Article 108 and the general provisions of Article 121, when only one act is committed is a difference more of form than of substance. We are persuaded then that when a single act violates both Articles, it was not intended that the offender be subjected to two punishments.[128]

The court in the *Davis*[129] case also rejected the interpretation that if the offenses may theoretically and conceivably be established by evidence not the same, cumulative sentences may be imposed. The court held that under the particular facts of that case unpremeditated murder was a lesser included offense of felony murder. Under a strict interpretation of the *Manual* and *Block-*

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[126] See, *e.g.*, United States v. Posnick, 8 USCMA 201, 24 CMR 11 (1957). [I]f the evidence sufficient to support a conviction on one charge will support a conviction on another charge, the two charges are not separate. *Id.* at 203, 24 CMR at 13. *Accord*, United States v. Modessett, 9 USCMA 152, 25 CMR 414 (1958).

[127] United States v. Brown, 8 USCMA 18, 23 CMR 242 (1957).

[128] *Id.* at 19–20, 23 CMR at 243–44. *Cf.* United States v. McClary, 10 USCMA 147, 27 CMR 221 (1959), which held larceny of government paint and wrongful disposition of the same paint to be separate for punishment purposes when the offenses were committed on two different days. See also United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961).

[129] United States v. Davis, 2 USCMA 505, 10 CMR 3 (1953).

burger rules the offenses would be separate since in order to prove felony murder it is not necessary to prove that the accused had an intent to kill or inflict great bodily harm, while it is not necessary to prove that the accused is engaged in the commission of a felony in order to prove unpremeditated murder. The court therefore established the rule that whether a lesser degree of homicide is included within that charged "depends almost exclusively on *the facts stated and proved in support of the offense alleged.*" [130] Again there is the emphasis on the proof rather than a mechanical examination of required elements.

Finally in the case of *United States v. Beene* [131] Judge Brosman announced his "legal norms" test. Although the court has never adhered to this test as such, the language used by the author judge is indicative of the tendency of the court to adopt a liberal interpretation of the rule while giving lip service to *Blockburger*.

> It is suggested that the views proposed here are in no wise immiscible with those expressed by the Supreme Court in the Blockburger case. Blockburger indicates that each count of an indictment must require proof of a distinct and additional fact in order that it may constitute a basis for separate punishment. Our point simply is that this *fact*, of which proof is demanded, must be significant in that it involves the infringement by the accused of a distinct norm established by society through its lawmaking agencies. In short, this separate *fact* must constitute the open sesame to a separate *norm*. To require less would be to permit the multiplication of punishment through the artful, but meaningless, rephrasings of the prosecutor.[132]

Thus, the Court of Military Appeals will not permit itself to be enslaved by terminology in attempting to determine whether offenses are separate for the purpose of imposing punishment. Surely it cannot be said that the court would adopt a more strict approach to the determination of what offenses are the same for purposes of successive prosecutions.

The foregoing conclusion is based on the assumption that the Court of Military Appeals would utilize the "same evidence" test of *Blockburger* to determine the "same offense" for purposes of former jeopardy. Such might not necessarily be the case. In a relatively recent decision that has largely escaped notice on the point here in question, Mr. Justice Brennan in a separate opinion presented a devastating critique of the "same evidence" test as a basis for determining identity of offenses in the double jeopardy

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[130] *Id.* at 508, 10 CMR at 6 (emphasis added).

[131] 4 USCMA 177, 15 CMR 177 (1954).

[132] *Id.* at 180, 15 CMR at 180.

area.[133] The government in that case contended that where there are two statutes involving separate interests and requiring different evidence, "the Fifth Amendment does not prohibit successive prosecutions of the same acts under the respective statutes.[134] Justice Brennan answered that "neither this 'same evidence' test nor a 'separate interest' test has been sanctioned by this court under the Fifth Amendment" except for purposes of punishment at a single trial.[135]

> In short, though the Court in *Gore* has found no violence to the guarantee against double jeopardy when the same acts are made to do service for several convictions *at one trial*, I think not mere violence to, but virtual extinction of, the guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest.[136]

There is no present indication that a majority of the Supreme Court is of the same mind. But at least one federal court has cited the above with obvious approval.[137] An analysis of the decisions of the Court of Military Appeals in the multiplicity area has revealed that the court is more liberal than most federal courts in determining separate offenses for punishment purposes.

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[133] Abbate v. United States, 359 U.S. 187, 196 (1959).

[134] *Id.* at 197.

[135] *Id.* at 197—98. He distinguished *Gavieres* by pointing out that that decision involved an interpretation of a congressional statute against double jeopardy applicable to the Philippine Islands, a country "with long-established legal procedures that were alien to the common law." *Id.* at 198, n. 2, citing Green v. United States, 355 U.S. 184, 197 (1957).

[136] *Id.* at 201.

[137] United States v. Sabella, 272 F.2d 206 (2d Cir. 1959). In that case the accused had been previously tried for selling heroin without a written order. The charges were dismissed after a verdict of guilty. He was subsequently charged with selling illegally imported heroin. Both indictments related to the same sale. Judge Friendly held that even though the defendant could have been punished for both offenses at a single trial, he could not be prosecuted for each at separate trials. Friendly indicated that although he would continue to follow *Gavieres* for double jeopardy purposes, that rule should not be confused with the *Blockburger-Gore* situation. His interpretation of *Gavieres* was that each indictment must require proof of a "*significant* fact not required by the other." *Id.* at 211 (emphasis added).

"The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone: The defendant may not later be tried again on that same fact situation, where no *significant* additional fact need be proved, even though he be charged under a different statute." *Id.* at 212 (emphasis added).

Judge Friendly noted that even though each charge required proof of facts that the other did not, the additional facts were not significant since all the Government needed to establish a prima facie case was proof of the accused's possession of the drug.

It has required that even if each offense may be theoretically established by proof of a fact not required by the other, the offenses are not separate unless the additional fact be significant.

The problem, of course, is to decide when an additional fact is significant. Furthermore, what may be significant for purposes of punishment might not be for purposes of successive trials. As to punishment, the question is not the harassment of the accused, but rather one of penology.[138] In other words, Congress may constitutionally provide for separate punishment within a single trial for offenses arising out of a single transaction. There is no question of double jeopardy, the only limitation being one of due process.

But even though it may be possible to punish for several offenses at a single trial, it does not follow that an accused may be prosecuted for each offense at different trials.[139] Not only is there the requirement of due process which is present in multiplicity cases, but there is the additional element of the harassment which is inherent in successive trials. Thus, even though an additional fact may have significance for purposes of punishment, it may have none at all for purposes of separate trials. This is what Judge Friendly was saying in *Sabella.*

To return to the military cases, since the Court of Military Appeals has required proof of a significant additional fact to permit multiple punishment at the same trial, it would, *a fortiori,* require proof of a significant additional fact for purposes of successive trials for offenses arising out of the same transaction and thereby arrive at a test similar to that propounded in *Sabella.*[140]

In the same speculative vein, a consideration of the new nonjudicial punishment article offers a somewhat unusual basis for

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[138] Gore v. United States, 357 U.S. 386, 393 (1958).

[139] Hoag v. New Jersey, 356 U.S. 464–67 (1958).

[140] An example of the extent to which the Court of Military Appeals will go to protect an accused from undue harassment is found in connection with the court's treatment of jurisdictional error. If the court-martial never had jurisdiction to try the accused (improperly constituted court, *e.g.*) the accused would never have been placed in jeopardy and therefore could be tried again even if acquitted at the first trial. If convicted at the first trial, the sentence limitations of Article 63(b), UCMJ, would not apply. The court therefore has (by using some rather involved reasoning on occasion) been reluctant to find jurisdictional error. See, *e.g.,* United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954); United States v. Padilla, 1 USCMA 603, 5 CMR 31 (1952). See also dissenting opinion of Judge Ferguson in United States v. Law, 10 USCMA 513, 518, 28 CMR 139, 144 (1959).

comparison.[141] The recently published addendum to the *Manual*[142] provides that "when punishment has been imposed upon a person under Article 15 for an offense, punishment may not again be imposed upon him for the *same offense* under Article 15. . . ."[143] Thus, we have in effect a double jeopardy provision for Article 15. The Army Regulations in implementation of Article 15 and the *Manual* provide pertinently as follows:

> *Double punishment prohibited.* See paragraph 128*d*, MCM, 1951. Several minor offenses *arising out of substantially the same transaction* will not be made the basis of separate actions under Article 15.[144]

Inasmuch as the cited paragraph relates to double punishment separately imposed, it would appear that the effect thereof is to provide a "same transaction" test to determine the "same offense" for purposes of non-judicial punishment. This, of course, represents only departmental policy and does not apply to courts-martial as such.[145] But it is an indication that it would be unfair to permit successive proceedings under the provisions of Article 15 for "offenses arising out of substantially the same transaction." It is no fairer to permit successive courts-martial for "offenses arising out of substantially the same transaction."

But even in the military an accused could find himself facing a second court-martial for an offense arising out of the same act or course of conduct which was the basis for a previous court-martial.[146] For there are some offenses which would be considered

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[141] UCMJ, Art. 15, authorizing nonjudicial punishment for minor offenses under specified conditions, was recently amended by Act of September 7, 1962, Pub. L. 87–648, § 1, 76 Stat. 447.

[142] ADDENDUM TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, promulgated by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963), incorporated recent changes to the Code and *Manual* (hereinafter cited as MCM, 1951 (Add.), para. ___).

[143] MCM, 1951 (Add.), para. 128*d* (emphasis added).

[144] Army Regs. No. 22–15, para. 3*e* (February 1, 1953) (emphasis added).

[145] It could, in a sense, be utilized at a court-martial. Article 15(f) provides that the imposition of nonjudicial punishment "for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission . . . ." The implication is that it would be a bar with respect to a minor offense arising out of the same act or omission. The same result could be reached by considering the regulations. If a person received punishment for a minor offense, paragraph 3*e* of the cited regulations would prohibit the imposition of separate nonjudicial punishment for another minor offense arising out of the same transaction. *A fortiori*, the same result should obtain if he were brought to trial for the second offense.

[146] The interesting question whether the mandatory joinder requirements of the *Manual* (MCM, 1951, para. 30*f*) would prohibit a subsequent prosecution for an offense that could have been joined has never been decided by the Court of Military Appeals. Of course, if additional charges come to light following the accused's arraignment at the first trial, there would be no objection to a subsequent trial on those charges. United States v. Davis, 11 USCMA 407, 29 CMR 223 (1960) (dictum).

separate whether the test utilized be liberal or strict.[147] In addition to double jeopardy, res judicata is also important in military as well as civilian legal practice.

V. RES JUDICATA IN THE MILITARY SYSTEM

A. *HISTORICAL DEVELOPMENT OF THE DOCTRINE*

The doctrine of res judicata was introduced into military law in 1945 by an Army board of review.[148] In that case the accused, together with nine of his companions, was charged with three specifications of murder and one of riotous conduct, all arising out of a single incident. In addition, the accused was charged with one specification of unlawful absence for a period covering the time of the riot and murders. Lawson's sole defense was alibi. He was acquitted of the murder and riot charges. He was found guilty of the unlawful absence but only for a period terminating two hours prior to the incident in question.

Following the trial Lawson was charged with four specifications of assault with intent to commit murder arising out of the same incident but involving victims different from those at the first trial. The defense made a special plea in bar on the grounds of double jeopardy, offering in support of the plea the record of trial in the former case. The law member refused to admit the evidence and denied the plea. Lawson was convicted.

On appeal the board of review agreed there was no question of double jeopardy, citing among other authorities, *Gavieres v. United States*.[149] The board, however, treated the plea as one of res judicata which it recognized as being applicable to criminal law. Using the presumption of rationality,[150] the board concluded that the court-martial acquitted the accused at the first trial on the basis of his testimony that he was not present at the scene of the crime. This determination was particularly apparent since the court-martial specifically, by exceptions and substitu-

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147 See, *e.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), wherein Judge Friendly held that conspiracy based on a particular overt act and the substantive offense involving the same overt act were separate offenses within the double jeopardy clause. The Court of Military Appeals is at least implicitly in accord with this conclusion. See United States v. Hooten, 12 USCMA 339, 343, 30 CMR 339, 343 (1961). *Cf.* United States v. Yarborough, 1 USCMA 678, 5 CMR 106 (1952) (multiplicity case).

148 CM ETO 15080, Lawson, 28 BR(ETO) 293 (1945).

149 220 U.S. 338 (1911).

150 "No other rational or consistent interpretation can be placed on the proceedings of the trial with its resultant findings." 28 BR(ETO) at 305.

tions, determined that the accused, unlike his companions, was not absent from his organization at the time of the incident.

Inasmuch as the prosecution at the second trial would be required to relitigate the question of the accused's presence at—and of course his participation in—the incident, the board held that the "plea" of res judicata should have been sustained. The board did not explain what it meant by a plea of res judicata. It did point out, however, that it would not normally be made in advance of trial because factual issues would be involved. It was apparent that the board was determined to establish law on the question of res judicata and was not going to be deterred by a strict construction of pleading—even though the defense offered an erroneous theory of the case.

As a result of this decision the 1949 *Manual for Courts-Martial* provided that res judicata could be utilized by the accused as a defense in appropriate cases.[151] This provision in substantially the same language was later incorporated in the present *Manual*.[152]

B. *APPLICATION OF THE DOCTRINE*

A reading of the present *Manual* provision indicates many aspects of res judicata, some of which have already been discussed in connection with federal practice, others of which are presented for the first time. A detailed examination of the provision as interpreted by the Court of Military Appeals will now be conducted.

1. *What Facts are Foreclosed*

The defense of *res judicata* is based on the rule that any issue of fact or law put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial even if the second trial is for another offense.[153]

The first point to be noted is that "any issue of fact or law" may be precluded.[154] There is no apparent requirement, for example, that the fact be ultimate, necessary, directly in issue, or arise from the same transaction. Thus, Judge Latimer has concluded:

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[151] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1949, para. 72*b*, promulgated by Exec. Order No. 10020, 13 Fed. Reg. 7519 (1948). Para. 64*d* indicated that res judicata could be utilized to dismiss the proceedings.

[152] MCM, 1951, paras. 67*d*, 71*b*.

[153] *Ibid.* Subsequent subdivisions will follow this format of introducing the material by way of pertinent quotations from paragraph 71*b*.

[154] The present section will for the most part be concerned with issues of fact. The question of legal issues will be discussed in Section VI, *infra*.

> If we are not guided by the wording of the Manual, we might be inclined not to extend the doctrine [of res judicata] to issues which do not arise out of one transaction or which do not bar a subsequent finding of guilt of another offense. However, the language used by the framers of the Manual is broad and sweeping and covers any issue of fact or law in issue and finally determined; makes no distinction as to issues directly involved or collaterally involved; it does not limit its application to issues arising out of one transaction; and we find no good reason to interpret the provision so narrowly as to require the accused again to litigate an issue which has been decided in his favor.[155]

In determining what facts will be foreclosed from relitigation, the Court of Military Appeals has adopted the two-phase approach, to decide what the first judgment determined and what bearing that determination has on the second case.

As to the first phase the court has consistently utilized a presumption of rationality to ascertain the basis for the acquittal.[156] With respect to the second phase, the court has not attempted to draw any distinction between evidentiary and ultimate facts. Although the court has not passed directly on that point, it has indicated that the application of the doctrine would extend to *any* fact necessarily determined by the prior acquittal.[157]

2. *Procedural Aspects*

> The accused, in a proper case, may assert an issue of fact finally determined by an acquittal as a defense. . . . A motion raising the defense of *res judicata* should ordinarily be made after the prosecution has rested its case or later unless it can be shown at an earlier stage of the trial that the issue of fact or law in the case on trial and in the case relied

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[155] United States v. Smith, 4 USCMA 369, 374, 15 CMR 369, 374 (1954). Chief Judge Quinn concurred in the opinion. This view of the binding effect of the *Manual* was reiterated by Judge Latimer in United States v. Martin, 8 USCMA 346, 349, 24 CMR 156, 159 (1957). The Chief Judge and Judge Ferguson specifically disassociated themselves from that portion of the opinion which indicated that the *Manual* sets the limits of the doctrine of res judicata. *Id.* at 352, 24 CMR at 162. See United States v. Smith, 13 USCMA 105, 32 CMR 105 (1962); United States v. Mims, 8 USCMA 316, 319, 24 CMR 126, 129 (1957) (concurring opinion of Judge Ferguson). Despite the broad language of *Martin*, the court in that case applied the doctrine not to "any fact" but only to that fact *necessarily* determined by the first judgment. 8 USCMA at 350–51, 24 CMR at 160–61.

[156] See, *e.g.*, United States v. Martin, 8 USCMA 346, 349, 24 CMR 156, 159 (1957). "A fair evaluation of human behavior compels a conclusion that the acquittal was based on the court-martial resolving that single issue [accused's presence] in favor of the accused." To the same effect, see United States v. Hooten, 12 USCMA 339, 342, 30 CMR 339, 342 (1961); CM 370251, Underwood, 15 CMR 487, 492 (1945). The latter decision includes a good discussion of the various approaches taken by the state and federal courts in applying the doctrine of collateral estoppel.

[157] This is true even though Chief Judge Quinn and Judge Ferguson do not consider the *Manual* provision to be binding. See United States v. Hooten, 12 USCMA 339, 341, 30 CMR 339, 341 (1961).

upon to sustain the motion are the same. Proof of the former adjudication may be made by the record of the trial relied upon to sustain the motion.

Although the *Manual* does recognize that collateral estoppel is included within the concept of res judicata—by providing that res judicata applies even where the second trial is for a different offense—it appears to limit the application of the doctrine to that situation where it operates as a complete defense, *i.e.*, where the fact precluded is essential to a conviction at the second trial. By failing to point out the distinction between collateral estoppel being used as a complete defense on the one hand and as an estoppel only as to certain facts on the other hand, the *Manual* provision has the effect of adding to the confusion already noted in connection with the federal cases.

This confusion is compounded by the procedure prescribed by paragraph 71*b*. Motions raising defenses are usually made immediately after the arraignment. Yet the *Manual* provides that the "defense" of res judicata would ordinarily be raised by a special motion predicated on the evidence to be made after the prosecution had rested its case. (The *Manual* unaccountably fails to point out that a failure to object to the evidence at the time offered would amount to a waiver.)

This whole area of confusion could probably best be solved by treating collateral estoppel as a rule of evidence for all purposes. When the government offers the evidence, the accused would object on the ground that the government is precluded from relitigating the particular fact in issue. The law officer would treat it as he does any other rule of evidence. The parties would be able to present evidence on the objection (in the form of the previous record of trial) and would argue their respective positions. The law officer would then decide what the previous acquittal determined and how that determination bears on the present case. If he concluded that the government was attempting to relitigate an issue previously decided in the accused's favor, he would sustain the objection. Although making collateral estoppel the subject of a motion to dismiss in those cases where it would operate as a complete defense would undoubtedly tend to expedite the trial, the proper time to raise an objection to the evidence is at the time it is offered, not in a preliminary motion. Proper procedure dictates that evidentiary questions be determined in accordance with established rules of evidence and not by consideration of expediency.

3. *Perjury*

In the *Martin* [158] case the accused was first charged with sodomy allegedly committed in a stockade chapel. He testified in his own behalf to the effect that he was never at the scene of the crime at any time during the evening in question and was acquitted. He thereafter testified at the trial of a fellow soldier who was charged with an act of sodomy with the same party at the same place but a little later in time on the same evening. He testified to the same extent as before for the purpose of impeaching certain prosecution witnesses who had placed both him and the second accused at the scene. This accused was convicted. Martin was subsequently charged with two specifications of perjury based on his testimony at each trial. His motion to dismiss on grounds of res judicata was denied, and he was found guilty of both specifications.

The Court of Military Appeals, after recognizing that the majority of state courts do not apply the doctrine of collateral estoppel to this situation, announced its intention to follow the federal courts. With respect to the accused's testimony at his own trial, the court concluded that the only rational basis for the acquittal was that the court-martial believed he was not present at the scene of the crime. The court accordingly held that the government should not be able to relitigate that issue and that prosecution for that offense was barred.

The court was undoubtedly correct in its conclusion that the government was attempting to relitigate the same factual issue which had been decided in the accused's favor at the previous trial. In support of its holding that the government should be precluded from relitigating this issue the court, however, stated the federal rule to be that "a defendant's prior acquittal precludes his subsequent prosecution for perjury committed at the former trial if a flat contradiction of the prior acquittal is involved in the subsequent prosecution." [159]

Perhaps a more precise statement would be that an accused's prior acquittal precludes his subsequent prosecution for perjury committed at the former trial if "a flat contradiction of the *basis* for the former acquittal" is involved. It is well to remember that it is not so much a question of permitting the government to contradict a previous acquittal as it is of permitting the government to relitigate a question which has already been decided in the

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[158] United States v. Martin, 8 USCMA 346, 24 CMR 156 (1957).

[159] 8 USCMA at 349–50, 24 CMR at 159–60, citing Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944).

accused's favor. The distinction may be more apparent than real, but it should be maintained.

The court then quoted with approval the following language from *Kuskulis v. United States:* [160]

> However, we agree with what is said in Allen v. United States [194 Fed. 664 (4th Cir. 1912)] that the government should not prosecute for perjury upon the same evidence as was relied upon in the former trial. We do not understand this to be true in the instant case.[161]

The reliance appears to be misplaced. To talk in terms of "same evidence" is to revert to double jeopardy tests—tests which should have no application as such to the doctrine of res judicata. Adopting a "same evidence" test to determine whether collateral estoppel should be invoked in a perjury prosecution is but one step removed from concluding that when the evidence is not the same, collateral estoppel may not be invoked. If the question of the accused's presence in the chapel has been determined in his favor, the issue should not be relitigated in a subsequent prosecution even if entirely different evidence is discovered and introduced. It is the *fact* of his presence that is foreclosed, not merely the "same evidence" in support thereof.[162]

As to the second specification the court concluded that collateral estoppel would not preclude the government from introducing evidence tending to show that the accused was present in the chapel while the second accused committed his offense. The court concluded that the finding of the court-martial which acquitted Martin that he was not present at the time he allegedly committed the act did not include a finding that he was not present when the offense was committed by the second accused.[163]

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[160] 37 F.2d 241 (10th Cir. 1929).

[161] 8 USCMA at 350, 24 CMR at 160. Judge Latimer wrote the opinion of the court. The other two judges merely concurred in the result.

[162] The court is undoubtedly placing the situation in its strongest light. That is, to permit such a result is tantamount to being tried twice for the same offense. "This, we see, approaches closely, whether acknowledged or not, an intuitive feeling akin to double jeopardy despite the fact that the two [doctrines] are distinct." Adams v. United States, 287 F.2d 701, 703 (5th Cir. 1961). This "intuitive feeling," while beneficial to an accused where the evidence is the same in both cases, may redound to his detriment in a situation where new evidence is offered at the subsequent trial.

[163] The court recognized that the accused had testified that he was not in the chapel all evening, but concluded that under the instructions of the law officer the court-martial was only required to find that the accused was not present at the scene during the time *he* was alleged to have committed the offense. That is to say, the court concluded that the accused's presence later in the evening was not *necessarily* determined by the acquittal. This conclusion undercuts Judge Latimer's contention in *Smith* that res judicata

In the *Hooten* [164] case the Court of Military Appeals reaffirmed its intention to apply the doctrine of collateral estoppel to perjury prosecutions arising out of the testimony of an accused at his previous acquittal. The court did not, however, reiterate its reliance on *Kuskulis* [165] and *Allen*.[166] This is understandable since in the *Hooten* case the government did not rely on the same evidence but introduced additional evidence in the form of testimony by the accomplice and a confession of the accused. Notwithstanding this, the court still held that the government was precluded from relitigating the same issue. It would appear that the reliance on *Kuskulis* and *Allen* in the *Martin* case was more in the nature of a makeweight than a conscious effort to limit the thrust of the doctrine of collateral estoppel. It is not difficult to understand, however, why the government felt it could properly subject Hooten to a perjury prosecution.[167]

The *Hooten* case is also significant in that it adopts a broad rule for the application of res judicata.

> Thus, the trial of the perjury charge based upon such testimony by the accused is a "flat contradiction of the prior acquittal." . . . Reaching this result, however, does not mean that, in order to invoke the doctrine of *res judicata*, the defense must exclude every other possible reason for his acquittal. So to narrow the scope of the defense would be to lay upon the accused an impossible burden. Rather, as we indicated in United States v. Martin, [8 USCMA 346, 24 CMR 156], at page 349, the question to be decided is whether, under the evidence and instructions at the first trial, a fair evaluation of human behavior compels the conclusion that the acquittal resulted from the matter again placed in issue at the second trial.[168]

The Court of Military Appeals has thus indicated that the policy that there be an end to litigation shall prevail over the

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applies to *any* fact, whether collateral or not. *Cf.* ACM S–19270, Warble, 30 CMR 839 (1960), *aff'd*, 12 USCMA 386, 30 CMR 386 (1961). The accused in that case was first charged with breach of restriction and driving without a license. He was acquitted of the former but convicted of the latter. He was subsequently tried for perjury on the basis of his testimony at the previous trial that he had not left his quarters on the evening in question. The board of review held that the Government was not precluded from prosecuting the accused for perjury since the first court-martial must have rejected his testimony that he had not left his quarters.

[164] United States v. Hooten, 12 USCMA 339, 30 CMR 339 (1961).

[165] Kuskulis v. United States, 37 F.2d 241 (10th Cir. 1924).

[166] Allen v. United States, 194 Fed. 664 (4th Cir. 1912).

[167] Hooten was also found guilty of conspiracy to commit perjury. The Court of Military Appeals held that the Government was also precluded from prosecuting him on this specification since the overt act alleged—the "wife's" false testimony that she received money from the accused to be deposited to his account—involved an issue previously determined against the Government.

[168] 12 USCMA at 342, 30 CMR at 342.

countervailing policy that "perjurers should not go unwhipt of justice." Although evidencing an initial tendency to rely on dubious precedent, the court has more recently adopted a position that is in accord with that of the federal courts.

4. *Mutuality*

In order for a party in a civil litigation to take advantage of a prior judgment he himself must also be bound by it.[169] Most federal courts which have considered the question have concluded —by way of dictum—that there is no requirement for mutuality in the criminal law application of collateral estoppel.[170] That is, it operates solely for the benefit of the accused. This conclusion is usually based on the premise that a defendant has a constitutional right to the trial of every issue raised in the prosecution of a criminal case.[171] The *Manual* has adopted this rule and the Court of Military Appeals on several occasions has indicated its approval.[172]

The *Manual* contains an apparent exception to the rule with regard to a conviction of fraudulent separation.[173] This requires further analysis. Essentially there are two problems here, or, to be more precise, two aspects of the same problem. The *Manual* first permits the government to introduce a final conviction of fraudulent separation and second precludes the accused from disputing the jurisdiction of the previous court-martial on the ground that his separation was not fraudulent. The first area concerns a rule of evidence, *i.e.*, the admissibility of a prior conviction, while the second primarily concerns a question of collateral attack, with res judicata playing only a supporting role.

As to the admissibility of evidence of an accused's previous conviction, the general rule is that so long as the evidence of prior

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169 See Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912). "It is a principle of general elementary law that the estoppel of a judgment must be mutual." *Id.* at 127. See also 1 FREEMAN, JUDGMENTS, § 428 (5th ed. 1925).

170 See, *e.g.*, United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961); United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943); United States v. Carlisi, 32 F.Supp. 479, 482 (E.D.N.Y. 1940). *But see* United States v. Rangel-Perez, 179 F.Supp. 619 (S.D. Cal. 1959); United States v. Bower, 95 F.Supp. 19 (E.D. Tenn. 1951). *Cf.* Steele v. United States, 267 U.S. 505 (1925).

171 As the Court in *DeAngelo* put it:

> An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. 138 F.2d at 468.

172 See, *e.g.*, United States v. Caszatt, 11 USCMA 705, 707, 29 CMR 521, 523 (1960); United States v. Smith, 4 USCMA 369, 372, 15 CMR 369, 372 (1954).

173 MCM, 1951, para. 71*b*.

offenses tends to establish a fact other than a criminal disposition on the part of the accused, such evidence is admissible, to the extent that it is reasonably necessary to the government's case.[174]

With this in mind, let us determine why the government would seek to offer evidence of a previous conviction for fraudulent separation. Article 83(2), UCMJ, provides that:

> Any person who . . . (2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.

It is to be noted that the article refers to "any person" and does not require that he be subject to the Code. Thus, a soldier who by his fraudulent act may have reverted to civilian status may nonetheless be tried by court-martial for his fraudulent conduct. But may he be tried for offenses committed prior to the fraudulent separation? In this connection, the special jurisdiction article of the Code provides pertinently as follows:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge. . . . *Upon conviction of that charge* he is subject to trial by court-martial for all offenses under [the Code] committed before the fraudulent discharge.[175]

The effect of Article 3(b) is to provide that conviction under Article 83(2) is a condition precedent to trial by court-martial for offenses committed prior to the fraudulent discharge.[176] The evidence of the accused's previous conviction, therefore, would be offered not to prove a criminal disposition on the part of the accused but rather to establish the condition precedent to trial by court-martial. The establishment of this condition is, of course, necessary to the government's case. Accordingly, there would be no reason why the government could not introduce the evidence—at least from an evidentiary point of view.

Let us consider the second aspect of the problem. As a general rule, a judgment rendered by a court having jurisdiction of the parties and of the subject matter may not be attacked in any collateral action or proceeding.[177] The rule is applicable to criminal

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[174] MCM, 1951, para. 138*g*. See United States v. Schaible, 11 USCMA 107, 111, 28 CMR 331, 335 (1960); United States v. Pavoni, 5 USCMA 591, 593, 18 CMR 215, 217 (1955); United States v. Haimson, 5 USCMA 208, 226, 17 CMR 208, 226 (1954).

[175] UCMJ, Art. 3(b) (emphasis added).

[176] There are no reported cases on this point.

[177] 1 FREEMAN, JUDGMENTS, § 305 (5th ed. 1925).

as well as to civil proceedings,[178] and, like res judicata, is based on the public policy that there be an end to litigation.[179]

Although a judgment generally may be collaterally attacked on the basis of lack of jurisdiction in those cases where the original court judicially considered and adjudicated the question of its jurisdiction, such finding is conclusive and not subject to collateral attack.[180] The effect of this is to apply res judicata to a court's determination of its own jurisdiction.

How does this bear on the present problem? The *Manual* provides that the accused shall be precluded from attacking the jurisdiction of the previous court-martial. This is consonant with the general rule if it can be ascertained that the question of jurisdiction was litigated and determined at the first trial. The jurisdictional basis for the previous court-martial, as to persons, was contained in the finding of guilty. That is, in order to have jurisdiction over the accused, the court-martial had to determine that he was a "person who [fraudulently procured] his own separation from the armed forces." By finding the accused guilty the court-martial thereby determined the jurisdictional basis for the trial. The matter was either litigated in the case of a plea of not guilty or admitted in the case of a guilty plea. The accused, therefore, may properly be precluded from attacking the validity of the prior judgment.

Accordingly, what at first appears to be an exception to the mutuality rule is not really an exception at all. Notwithstanding the fact that res judicata does play a minor part in the proceedings, the *Manual* provision does not directly concern that doctrine but rather that of collateral attack.[181] In order to avoid confusion, therefore, it would be well to place that portion of paragraph 71*b* in a more appropriate section of the *Manual*.

VI. FINALITY OF LEGAL ISSUES

Thus far the binding effect of a judicial determination has been discussed in relation to double jeopardy and in relation to issues

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178 See, *e.g.*, Lafever v. United States, 171 F.Supp. 553 (S.D. Ind. 1959), *aff'd*, 279 F.2d 833 (7th Cir.), *cert. denied*, 364 U.S. 904, *reh. denied*, 364 U.S. 929 (1960).

179 1 FREEMAN, JUDGMENTS, § 305 (5th ed. 1925).

180 Baldwin v. Traveling Men's Ass'n, 283 U.S. 522 (1931). Although the court spoke in terms of "res judicata," the case is more properly included within the concept of collateral attack. *Cf.* United States v. Hayland, 264 F.2d 346, 351–52 (7th Cir. 1959).

181 See Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12, 21–28 (1957).

of *fact*, res judicata. This chapter will consider the question of finality of *legal* issues as related to the doctrines of res judicata and law of the case.

A. *RES JUDICATA AS TO LEGAL ISSUES* [182]

In a sense the previous discussion of res judicata referred to legal issues. For even in the case where factual issues are to be precluded, principles of law play an important part. It is not the findings of fact as such which determine the verdict but rather the conclusion of the jury or court-martial as to the effect of those facts within a legal framework laid down by the judge in his instructions. Every judgment, therefore, necessarily involves the application of principles of law to the facts of the individual case.

However, res judicata does not strictly speaking apply to principles of law as such. It applies to all issues previously decided and the effect those issues—be they factual or legal—may have on subsequent litigation. But abstract principles of law applied in one case have no binding effect in a subsequent case when divorced from the factual setting in which the legal principles were applied, although they may be followed under the doctrine of stare decisis. As the Supreme Court noted in a civil case:

> The contention of the Government seems to be that the doctrine of *res judicata* does not apply to questions of law; and in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based.[183]

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[182] We are actually concerned here with collateral estoppel, *i.e.*, the binding effect of legal issues in subsequent cases on different causes of action. The internal application of legal principles is more properly a question of law of the case and will be discussed in some detail in that connection.

[183] United States v. Moser, 266 U.S. 236, 242 (1924). In that case a retired naval officer had obtained judgments in the Court of Claims for installments of increased pay on the ground that he should have been retired in the next higher grade. The Supreme Court held that the Government was estopped in a separate action on another installment from maintaining that the officer should not have been retired in the next higher grade since that issue had been decided against it in the previous litigation.

In other words, when the same *legal issue* is presented at a second trial between the same parties, that issue is binding upon the litigants. Determining what is the "same issue," however, may prove to be difficult.[184] This is generally accomplished in civil law by requiring that the successive action not only involve the same question of law but also arise out of the same transaction or concern the same subject matter.[185] This is true with regard to criminal prosecutions as well as to civil actions.

Consider the *Carlisi* [186] case. The accused in that case was first charged with illegal possession of a still. The court held at that trial that the search of a certain home and the seizure of the still was illegal. A judgment was accordingly entered dismissing the indictment. The accused was subsequently charged with conspiracy to possess the unlawful distilling equipment. When the government offered the testimony of the agent who had conducted the search and seizure, the accused objected on the grounds of collateral estoppel. The testimony was excluded "upon the ground that the judgment of acquittal and the decision that the search and seizure was illegal were conclusive of the rights of the parties." [187]

The Court of Military Appeals had occasion to consider the application of res judicata to legal issues in its first decision concerning that doctrine.[188] The accused in that case was originally charged with larceny of two letters. The prosecution offered in evidence a statement of the accused in which he admitted stealing the two letters and in addition a package containing clothing. The two offenses were unrelated. The law officer excluded the confession on the ground that the agent who obtained the statement had neither personally advised the accused under Article 31, UCMJ, nor had been present when a third party had done so.[189]

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[184] See, *e.g.*, Yates v. United States, 354 U.S. 298, 335–38 (1957); Commissioner v. Sunnen, 333 U.S. 591 (1948); United States v. Stone & Downer Co., 274 U.S. 225 (1927).

[185] See RESTATEMENT, JUDGMENTS, § 70, comment b (1942).

[186] United States v. Carlisi, 32 F.Supp. 479 (E.D.N.Y. 1940).

[187] *Id.* at 481. It will be noted that *Carlisi* represents an application of the doctrine of collateral estoppel as a rule of evidence. The court did not dismiss the charges but ruled that witnesses other than those engaged in the illegal search and seizure could testify as to the conspiracy since it was not essential to the prosecution's case that actual possession of the still be proven.

[188] United States v. Smith, 4 USCMA 369, 15 CMR 369 (1954).

[189] UCMJ, Art. 31, provides pertinently as follows:

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(b) No person subject to this [Code] may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him

The law officer then granted a defense motion for a finding of not guilty.

The accused was subsequently charged with the larceny of the package. The prosecution at the trial again offered the confession in evidence, relying on exactly the same evidence to support its burden of voluntariness. The defense objected this time on the grounds of collateral estoppel. The law officer overruled the objection and received the statement in evidence. The accused was convicted.

The board of review in its decision recognized that collateral estoppel would apply with respect to offenses arising from the same subject matter or transaction. But it concluded that since the two offenses—larceny of the two letters and larceny of the package—did not arise out of the same subject matter or transaction, the doctrine was inapplicable in this case.[190]

The Court of Military Appeals, Judge Brosman dissenting, reversed the decision of the board of review. Judge Latimer, writing for the court, concluded that the ruling of the first law officer, albeit erroneous, was binding even though the separate offenses involved in each trial did not arise out of the same transaction.[191] He found in addition that there was a community of interest—and in that sense a single transaction—in the confession taken by the criminal investigators and that the government was accordingly estopped from utilizing the confession in the second case.[192]

Judge Brosman concluded that the majority gave "excessive effect to a ruling which may be little more 'than a procedural step in a particular case.' " [193] He believed that there should be

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that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

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(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

[190] CM 361748, Smith, 10 CMR 262 (1953).

[191] Res judicata, of course, applies whether the issues determined at the first trial were decided correctly or incorrectly.

[192] Judge Latimer had also indicated earlier in his opinion that the *Manual*, which he considered binding, does not limit the applicability of res judicata to issues arising out of the same transaction. 4 USCMA at 374, 15 CMR at 374.

[193] 4 USCMA at 377, 15 CMR at 377, citing United States v. Wallace Co., 336 U.S. 793 (1949). *Cf.* United States v. Summers, 13 USCMA 573, 33 CMR 105 (1963).

some limitations placed on the prospective effect of an interlocutory ruling by the law officer—a point he believed overlooked by the majority. Brosman therefore would apply collateral estoppel only where the second trial was for another offense arising out of the same transaction on the ground that the doctrine would then be operating in its proper sphere of activity—as a substitute for double jeopardy to prevent undue harassment of the accused. He felt that to extend it further would be to give an unfair advantage to the accused, especially in view of the fact that there is no mutuality of estoppel and no government appeal of erroneous rulings by the law officer.

Although there is much to be said for Judge Brosman's views, the *result* of the majority seems to be correct. Aside from any labels that may be employed, the question, as always, is whether the government is attempting to relitigate an issue previously decided in the accused's favor. The issue decided in the first trial in this case was the admissibility of the confession—not the correctness of an abstract principle of law. That issue was decided adversely to the government. Under general principles of collateral estoppel the government should be precluded from relitigating the issue, whether it be called a legal issue, a mixed question of law and fact, or a pure question of law. When the government offered the same confession at the second trial—whether or not the same evidence was to be presented—it was attempting to relitigate the same issue. The court was therefore correct in holding that the government was estopped from so doing.[194]

Applying collateral estoppel to the *Smith* situation would not, as Judge Brosman feared, serve to perpetuate an error of law. If the accused should at a later date make another confession under the same circumstances but involving different offenses, he would not be immune from a correct ruling by the law officer since the admissibility of that confession would not be the same issue as the admissibility of the previous confession.

In order not to give excessive effect to mere interlocutory rulings, however, it appears wise to apply collateral estoppel only when such rulings result in a final judgment in the first case as in *Smith*.[195] Thus in the case of a mistrial, the interlocutory

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[194] MCM, 1951, para. 30*f*. An unexpressed but undoubtedly important factor in the majority decision is the violation of the "rule" against consecutive trials for separate but known offenses. There was no reason why the Government could not have joined the two offenses as required by the *Manual*.

[195] "[I]t is familiar law that only a final judgment is *res judicata* as between the parties." Merriam v. Saalfield, 241 U.S. 22, 28 (1915). *Accord*, 2 FREEMAN, JUDGMENTS, § 717 (5th ed. 1925). See MCM, 1951, para. 67*f*,

rulings of the law officer at the first trial should not be binding on the parties at the second trial.[196] The same result would obtain in the case of a rehearing following appellate review. There, the rulings of the law officer would not be final since a rehearing is merely a continuation of the prior proceedings.[197]

B. *LAW OF THE CASE*

The doctrine of law of the case, although having some of the characteristics of res judicata, is more limited in application. It is concerned solely with questions of law and operates only with respect to subsequent proceedings in the same case. Simply stated, the doctrine provides that a ruling on an issue of law is generally binding on the litigants until it is reversed. Although the law of the case primarily relates to the binding effect of the decision of an appellate court on subsequent proceedings, it also has a limited application at the trial level.

As to the appellate aspect of the doctrine, the decision of an appellate court establishes the law of the case not only for the trial court on remand but also for itself on a subsequent review and for any other appellate court of inferior rank before which the case subsequently is brought. The rule, however, unlike res judicata is one of discretion and not compulsion.[198] As Mr. Justice Holmes noted in this connection:

> In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them

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which permits the convening authority to return rulings to the law officer for reconsideration. Finality with respect to factual determinations is no problem since an acquittal is final, although this was not always the case. Prior to the 1920 Articles of War the appointing authority could return the record of trial to the court-martial for reconsideration of a finding of not guilty. See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266, 274 (1958).

[196] *Cf.* United States v. Summers, 13 USCMA 573, 33 CMR 105 (1963), where the Court of Military Appeals held that an evidentiary ruling by the law officer in one court-martial was not binding on another law officer at the court-martial of another accused even though the same evidence was presented in both cases. The ruling was considered to be no more than a procedural step in a particular case, not extending beyond that case. See United States v. Wallace Co., 336 U.S. 793, 801–02 (1949); United States v. One Plymouth Sedan Automobile, 167 F.2d 3 (7th Cir. 1948).

[197] See United States v. Sicley, 6 USCMA 402, 20 CMR 118 (1955), where the Court of Military Appeals impliedly held that collateral estoppel would not be applicable at a rehearing to *factual* issues decided at the previous proceedings. *But see* dissenting opinion of Judge Latimer. *Id.* at 415–16, 20 CMR at 131–32. *Cf.* CM 398680, Godwin, 25 CMR 600, 604, 605 (1958).

[198] See, *e.g.*, Woodworkers Tool Works v. Byrne, 202 F.2d 530 (9th Cir. 1953).

> in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.[199]

While an appellate court upon a second review has the power to reach a result inconsistent with its first review of the case, it will generally not do so unless there is a material difference in the evidence offered at the two trials[200] or a clear case is presented showing that the earlier decision was plainly wrong and that application of the rule would work a manifest injustice.[201] Furthermore, the doctrine does not extend to matters not decided by the appellate court, although it does apply to all matters presented and decided and necessarily involved in the case even though the points are not specifically noted in the mandate of the court.[202] Matters decided on appeal also constitute the law of the case for the trial court upon remand.[203] The rule applies, however, only when the pertinent facts in the second trial are the same or substantially the same as those at the first. Otherwise the question of law previously decided on appeal would have no application.[204]

The Court of Military Appeals has indicated that it will follow the federal courts in applying law of the case at the appellate level.

> As a general rule, a question considered and determined on the first appeal of a case is "the law of the case" on the same questions between the same parties on their subsequent appeal. . . . But the rule is not one of inflexible application and the authorities we prefer to follow state the rule to be that when the law as previously announced is unsound and works a substantial injustice, it need not be enforced.[205]

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[199] Messenger v. Anderson, 225 U.S. 436, 444 (1912). *Accord,* Southern R.R. v. Clift, 260 U.S. 316 (1922).

[200] See, *e.g.,* Henderson v. United States, 218 F.2d 14, 16 (6th Cir.), *cert. denied,* 349 U.S. 920, *reh. denied,* 349 U.S. 969 (1955).

[201] See, *e.g.,* Brown v. Gesellschaft Fur Drahtlose Tel., 104 F.2d 227 (D.C. Cir. 1939), *cert. denied,* 307 U.S. 640 (1939).

[202] See, *e.g.,* Bertha Building Corp. v. National Theatres Corp., 166 F.Supp. 805 (E.D.N.Y. 1958), *aff'd,* 269 F.2d 785 (2d Cir. 1959), *cert. denied,* 361 U.S. 960 (1960).

[203] See, *e.g.,* United States v. Watson, 146 F.Supp. 258, 261 (D.D.C. 1956), *rev'd on other grounds,* 249 F.2d 106 (D.C. Cir. 1957).

[204] See Criscuolo v. United States, 250 F.2d 388, 389–90 (7th Cir. 1957); Marron v. United States, 18 F.2d 218, 219 (9th Cir. 1926), *aff'd,* 275 U.S. 192 (1927); United States v. Murphy, 253 Fed. 404 (S.D.N.Y. 1918). *Cf.* United States v. Shotwell Mfg. Co., 355 U.S. 233, 244, n. 20 (1957).

[205] United States v. Bell, 7 USCMA 744, 745–46, 23 CMR 208, 209–10 (1957), citing *inter alia,* Brown v. Gesellschaft Fur Drahtlose Tel., 104 F.2d 227 (D.C. Cir. 1939), *cert. denied,* 307 U.S. 640 (1939). See CM 399854, Kepperling, 28 CMR 466, 468 (1959), *aff'd,* 11 USCMA 280, 29 CMR 96 (1960). *Cf.* CM 398866, Wallace, 27 CMR 605, 607–08 (1958) where the board of review indicated that an appellate court should change its position only under extraordinary circumstances.

Of more immediate concern to us, however, in our consideration of the binding effect of judicial determinations on subsequent trials, is that aspect of law of the case which prevails at the trial level. The decision of the Court of Military Appeals or the board of review as to legal questions establishes the law of the case which is generally binding on the parties at the trial level where the evidence is the same and the charges identical.[206] If there has been a change in circumstances, the previous holding might not be binding, not because it is an incorrect statement of the law, but because it has no application to the present facts. It would seem, however, that as a general rule the situation will ordinarily be substantially the same at the rehearing, thus requiring adherence to the decision of the appellate body.

Perhaps a more interesting problem arises in the situation where the appellate court has not rendered a decision on the legal ruling in question. In such a case must the law officer in a rehearing—or for that matter in the case of a mistrial, where there was no appellate decision—follow the interlocutory rulings of law made by the law officer at the first trial? The question has caused considerable difficulty in the federal courts.

As a rule of judicial comity judges will generally not review the rulings of other judges of the same or of a co-ordinate court. The matter, however, appears to be essentially one within the sound discretion of the trial judge.[207] Until recently most federal courts felt that the rule was not merely one of discretion but was more binding in application.[208] This was generally based on one of two grounds: (1) The second judge should defer to the ruling of the first judge as a matter of mutual respect between members of the same court; or (2) If judges do not so defer, the defeated party would tend to shop about in the hope of finding a judge more favorably disposed. Although the problem is not completely settled, the best rule seems to be that expressed in *Dictograph Products Co.* v. *Sonotone Corp*,[209] where the court held that,

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[206] See CM 398866, Wallace, 27 CMR 605, 606–07 (1958). *Cf.* United States v. Vanderpool, 4 USCMA 561, 567, 16 CMR 135, 141 (1954).

[207] See United States v. Koenig, 290 F.2d 166 (5th Cir. 1961), *aff'd*, 369 U.S. 121 (1962).

[208] See Bertha Building Corp. v. National Theatres Corp., 166 F.Supp. 805, 811 (E.D.N.Y. 1958), and cases cited therein. *Cf.* United States v. Davies, 3 F.Supp. 97 (S.D.N.Y. 1933).

[209] 230 F.2d 131 (2d Cir. 1956), *cert. denied*, 352 U.S. 883 (1956).

although the decisions of previous judges should be accorded great weight, there should be no compulsion to do so.[210]

As to the military practice, the Court of Military Appeals has stated that the rulings of the law officer represent the law of the case and unless set aside on appeal are binding on the parties.[211] Whether this would extend to a rehearing or mistrial is open to question.[212] The rulings of previous law officers should be accorded great weight but should not be binding if clearly erroneous. Under present military practice there is little, if any, shopping around for law officers, and as to the question of mutual respect, "judicial sensibilities should play no part in the disposition of suitors' rights." [213]

Another aspect of law of the case at the trial level is found in the general rule that the instructions of the judge constitute the law of the case for that particular trial and must be followed by the jury whether correct or not.[214] This rule, which is designed to discipline juries for failure to perform their sworn duties, has been consistently followed by military courts. Thus, where the law officer instructed the court-martial that circumstantial evidence no matter how persuasive would be insufficient to sustain a finding of guilty of perjury, an Army board of review reversed a conviction based solely on circumstantial evidence even though the instructions where erroneous and even though such circumstantial evidence was legally sufficient to support the findings.[215] The board stated:

> Instructions given to the court constitutes [sic] the law of the case, and the court was obligated to follow it. The entire concept of the law of instruction would be negated if court members could ignore the instructions given or substitute their conclusions of what the law is. It is the duty of the law officer to declare the law and the duty of the court members to follow the law as given to them. Whether the instruction correctly states the law is not a matter for the court members' consideration

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210 *Id.* at 134–35. See United States v. Koenig, 290 F.2d 166, 172–73, n. 10 (5th Cir. 1961) for a compilation of the cases representing the conflicting views.

211 United States v. Strand, 6 USCMA 297, 306, 20 CMR 13, 22 (1955).

212 See CM 398680, Godwin, 25 CMR 600, 604, 605 (1958).

213 Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 135 (2d Cir. 1956).

214 See, *e.g.*, Carroll v. United States, 16 F.2d 951, 954 (2d Cir. 1927), *cert. denied*, 273 U.S. 763 (1927); American R.R. v. Santiago, 9 F.2d 753, 757 (1st Cir. 1926).

215 CM 392833, Anders, 23 CMR 448 (1957). The board ordered a rehearing. Under the appellate law of the case the law officer at the second trial would be bound by the ruling of the board of review and not by the ruling of the first law officer.

and a finding of guilty returned in disregard to the instructions must be set aside. . . .[216]

Is the law of the case as established by the law officer binding on appellate authorities? In a sense it is, but only in a limited sense. If the law officer, for example, admits certain evidence based on an erroneous theory of the law, the board of review will reverse the conviction if such error was prejudicial to the accused. On the other hand an erroneous ruling in favor of the accused is in a sense binding on the government since it may not appeal that determination. Likewise the board of review and the Court of Military Appeals are "bound" by that ruling in deciding whether the evidence is legally sufficient to sustain the findings of guilty. But the erroneous ruling is not completely insulated from government attack.

Consider the *DeLeon* case.[217] The accused was convicted of several offenses arising out of an illegal scheme to effect the early separation of certain enlisted men. At the trial the law officer ruled that testimony concerning the contents of an intercepted telephone conversation was inadmissible. However, he permitted the government to introduce evidence obtained as a result of the conversation. The board of review believed that it was bound by the law officer's ruling on the admissibility of the telephone conversation on the basis of res judicata, citing *United States v. Smith.*[218] The board therefore held that the evidence obtained as a result of the telephone conversation was inadmissible as "fruit of the poisonous tree" and set aside the findings of guilty as to those offenses relating to the inadmissible evidence.

The Court of Military Appeals on review held first that the law officer's ruling on the admissibility of the telephone conversation was erroneous. The court held further that the board misunderstood the *Smith* case since res judicata has no relation to appellate review of a ruling by the law officer at the trial of the same case. The court then proceeded to delineate the limits of appellate review with respect to the law officer's ruling as to admissibility of evidence.

If the accused is acquitted, the Government, of course, cannot appeal from rulings by the law officer which erroneously exclude material evidence against him. But, if convicted, the accused is entitled to appellate

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[216] *Id.* at 452. *Accord,* CM 405413, Hall, 30 CMR 550, *petition for review denied,* 12 USCMA 747 (1961). See ACM 16818, Green, 29 CMR 868, 872 (1960); ACM 15904, McArdle, 27 CMR 1006, 1018–19 (1959).

[217] United States v. DeLeon, 5 USCMA 747, 19 CMR 43 (1955).

[218] 4 USCMA 369, 15 CMR 369 (1954).

> review of erroneous rulings which may have prejudiced his defense. However, the accused's right is not exclusive. To support the conviction, the Government may also properly challenge erroneous rulings by the law officer. It may do so not for the purpose of obtaining consideration by the appellate tribunal of the excluded evidence, but for the purpose of showing that other evidence which has been admitted is not illegally tainted.[219]

The court accordingly held that since there was no illegal interception of the telephone conversation, the evidence obtained thereby was not "fruit of the poisonous tree" and was thus admissible in evidence.[220]

VII. CONCLUSIONS

The state, for reasons of public policy, has an interest in seeing that there be an end to litigation. And so does the accused, only for more personal reasons. It has been shown that a single "act" may violate several statutory norms, and that several "acts" in a single transaction may violate one statutory norm several times. What protection does an accused have against being forced to run the gantlet more than once for what is essentially a single course of criminal conduct? The Constitution provides that no one shall be placed in jeopardy more than once for the same offense. This constitutional protection has been judicially frustrated. Under a strict and oftentimes mechanical interpretation of what constitutes the "same offense," the courts have permitted successive prosecutions for offenses that really do not differ significantly. Probably the most compelling explanation for this result is the general inability of the government to appeal an "erroneous" acquittal. There is, in other words, a reluctance on the part of the judiciary to permit an accused to go "unwhipt of justice," notwithstanding the vexation of multiple trials.

Three possible solutions to this undesirable situation are: (1) Permit prosecution appeals of acquittals based on errors of law; (2) Adopt a more liberal test for identity of offenses; (3) Require joinder of all known offenses arising out of a single transaction. The basic unfairness associated with government

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[219] 5 USCMA at 756–57, 19 CMR at 52–53.

[220] Chief Judge Quinn wrote the opinion of the court. Judge Latimer dissented on the question of the admissibility of the intercepted conversation. Judge Brosman concurred with the opinion of the court, stating he doubted "that the linked evidence found here bore a sufficiently close relationship to that excluded to make of it any sort of arboreal 'fruit'—toxic or the reverse." *Id.* at 757, 19 CMR at 53.

appeals serves to remove that solution from further consideration.[221]

A more liberal interpretation of the "same evidence" test would indeed be a welcome and an effective remedy. The most hopeful portent in this direction is found in the test adopted in *United States v. Sabella*[222] which provides that once a defendant has been tried on a factual situation, he may not be tried again on that same factual situation when the government is not required to prove a *significant* additional fact at the second trial. If this approach were widely followed, the constitutional guarantee would be more likely to provide a sufficient protection from the vexation of duplicatory litigation.

The best solution to the problem, however, would be compulsory joinder of known offenses.[223] Permitting the government to subject an accused to successive prosecutions until a conviction is obtained not only results in undue harassment of the accused but also places an unwarranted premium on poor preparation. Requiring the prosecutor to try all known offenses at a single trial would remove the harassment and should result in better prepared cases. The government would, of course, be able to prosecute at a later trial for any offenses not known at the time of the original trial, consistent with the double jeopardy clause.

Because of the narrow interpretation of "same offense," the federal courts have applied the civil law doctrine of collateral estoppel to preclude the relitigation of those issues determined by previous acquittals. Generally, the courts have been liberal in the application of this doctrine. There has been, however, an unfortunate tendency to limit its effect to the situation where it operates at a complete defense to a second prosecution.

If collateral estoppel were to be considered solely as a substitute for double jeopardy, it could be argued that with compulsory joinder or a more liberal interpretation of the "same evidence" test, the necessity for the doctrine would end. In other words, if all offenses arising out of the same transaction are tried at a single trial, the accused is adequately protected. This view, however, places undue emphasis on the historical genesis of collateral estoppel to the exclusion of the policy behind the doctrine. It is true that collateral estoppel was introduced into criminal law as a direct result of hypertechnical interpretations of what con-

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221 See Kepner v. United States, 195 U.S. 100 (1904).

222 272 F.2d 206 (2d Cir. 1959).

223 The present federal rules are only permissive. See FED. R. CRIM. P. 8(a).

stitutes the "same offense" for purposes of multiple trials. And while it may therefore operate in a sense as a substitute for double jeopardy, it must not be forgotten that the underlying policy of collateral estoppel contemplates that there be an end to litigation and that the accused not be harassed by forced relitigation of issues previously decided in his favor. The fact that the offenses may have arisen out of separate transactions should not change the result—at least not in criminal cases.

There is little danger that the accused would thereby be placed in an unnecessarily favorable position vis-a-vis the state. The practical effect of requiring the factual issue to have been necessary to the first judgment is to limit the operation of collateral estoppel in the majority of cases to offenses arising out of the same transaction. If an accused, for example, committed two separate robberies in the same city but at different times on the same evening, an acquittal of the first robbery charge on the sole defense of alibi would not preclude the government from proving at a subsequent trial that he was at the scene of the second robbery. A determination that he was not at the scene of the first robbery is not a determination that he was not at the scene of the second robbery.[224]

Collateral estoppel as to legal issues is also for all practical purposes limited to the same transaction. The usual situation would be two offenses arising out of the same course of conduct, but it may also extend to some other common factual situation, such as the taking of a confession. So long as the *issue* is the same in both cases, however, collateral estoppel will apply without danger of perpetuating an error of law.

Thus, the doctrine of collateral estoppel has an important role to play in the administration of military justice. Even with compulsory joinder and—it is to be hoped—a liberal interpretation of "same offense," there is every reason to retain the doctrine, even if the offenses in question did not arise out of the same transaction.

It has been shown that collateral estoppel is essentially a rule of evidence. Treating it as a rule of evidence for all purposes will serve to dispel much of the confusion that surrounds the doctrine and at the same time will guarantee that an accused is not called upon to run the gantlet a second time as to any issue which was necessarily decided in his favor by a previous acquittal, even in those cases where it might not operate as a complete defense.

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[224] *Cf.* United States v. Kramer, 289 F.2d 909, 917 (2d Cir. 1961).

THE DEVIL'S ARTICLE*

BY WING COMMANDER D. B. NICHOLS**

I. INTRODUCTION

Conduct to the prejudice of good order and discipline is one of the offenses which form the hard core of military law. For several centuries, it has served military law well. It has been a basic weapon in punishing conduct contrary to the prevailing service ethic. It has enabled British and American armies to adapt their standards to the stress of wars and to developments in the techniques and technologies of war. It has also served in pioneering new countries, in the development and control of empires, in military occupations, in cold wars, and in all the varied uses to which armies have been put. It has been a weapon administered primarily by laymen. Whether it will serve equally well in the present era in which lawyers play a greater part, particularly through court-martial appeal courts, remains to be seen.

The comments of Lord Reid in a dissenting judgment in the House of Lords on a recent civil appeal against a conviction for conspiracy to corrupt public morals illustrate the broad problem posed by the change in military law from a layman's law to a lawyer's law:

> Finally I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that it does not matter if this offence is very wide: no one would ever prosecute and if they did no jury would ever convict if the breach was venial. Indeed, the suggestion goes even further: that the meaning and application of the words "deprave" and "Corrupt" (the traditional words in obscene libel now enacted in the 1959 Act) or the words "debauch" and "corrupt" in this indictment ought to be entirely for the jury, so that any conduct of this kind is criminal if in the end a

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency, or of the Australian Department of Air.

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> jury think it so. In other words, you cannot tell what is criminal except by guessing what view a jury will take and juries views may vary and may change with the passing of time. Normally the meaning of words is a question of law for the court. For example, it is not left to a jury to determine the meaning of negligence: they have to consider on evidence and on their knowledge a much more specific question—Would a reasonable man have done what this man did? I know that in obscene libel the jury has great latitude but I think that it is an understatement to say this has not been found wholly satisfactory. If the trial judge's charge in the present case was right, if a jury is entitled to water down the strong words "deprave", "corrupt", or "debauch" so as merely to mean to lead astray morally then it seems to me that court has transferred to the jury the whole of its functions as censor morum, the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.[1]

For centuries, the court-martial has been the censor morum. It may be incompatible with the appellate function of court-martial appeal courts and with the advent of professionals that this should survive. The offense has not been without its critics. Lord Hardinge in his evidence to the Royal Commission on Military Punishments in 1836 stated that it was commonly known in the British Army as the "Devil's Article." [2]

The technical problems involved in the transition have not been finally resolved. Is it sufficient for the law officer and the appeal court to define what is meant by conduct to the prejudice of good order and discipline, to use Lord Reid's analogy with negligence? Is it proper for an appeal court to go further and say as a matter of law that certain types of conduct cannot amount to this offense? Is the question one of law or of fact? Is the court or the law officer the censor morum? Can the court apply its general service knowledge and take judicial notice of the customary use of this offense? Or should this facility be transferred to the law officer and judicial precedent replace military custom? Are the problems too great for resolution by military lawyers and should they be left to the legislature? [3] Which is preferable, the common law approach of *United States v. Kirksey*[4] or the Congressional prescription of the bad check offense?

The purpose of this article is to explore these problems primarily in the light of military legal history and the case law

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[1] [1961] 2 All E.R. 446, 460.

[2] 5 J. ARMY HISTORICAL RESEARCH SOC'Y 202 (1926).

[3] One aspect of this question was dealt with by Captain J. A. Hagan in 10 MIL. L. REV. 114 (1960). The writer wishes to acknowledge at the outset his indebtedness to Captain Hagan's stimulating survey of the problems posed by the general article.

[4] 6 USCMA 556, 20 CMR 272 (1955).

emerging from the American, British, Canadian, Australian and New Zealand Courts-Martial Appeal Courts. The civil law is primarily of value in providing a setting.[5] Even offenses such as public mischief fall considerably short of conduct to the prejudice in breadth.

II. THE EVOLUTION OF THE BRITISH GENERAL ARTICLE

The general article crystallized in the seventeenth and eighteenth centuries. It took a number of forms in the seventeenth century, and first appeared in the Articles of War for 1625. These Articles provided: "All other disorders whatsoever are to be punished, as these formerly nominated." [6] It took a rather different form in the Articles for 1627 which provided: "60. All other abuses and offences not specified in these Orders shall be punished according to the discipline of warr and opinions of such officers and others as shall be called to make a Councell of Warr." [7] Its form differed again in the Articles issued by the Earl Marshal in 1639 which provided:

> In whatever cases or accidents that may occurre, for which there is no speciall order set downe in the lawes here published, there the ancient course of marshall discipline shall be observed untill such time as his Excellence The Lord General shall cause some further orders to be made and published in the Armie, which shall thence forward stand in force upon the paines therein expressed.[8]

In the Articles issued in 1640 by the Earl of Northumberland and those issued in 1642 by the Earl of Essex, it took a common form: "All other faults, disorders and offences, not mentioned in these articles, shall be punished according to the general customes and laws of warre." [9] In the Articles for 1643, it took yet another form: "Matters, that are clear by the light and law of nature, are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterwards." [10]

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[5] BRETT AND WALLER, CASES AND MATERIALS IN CRIMINAL LAW 68–109 (1962).

[6] 5 J. ARMY HISTORICAL RESEARCH SOC'Y 202 (1926).

[7] *Id.* at 111, 202.

[8] *Id.* at 202. See also 1 CLODE, MILITARY FORCES OF THE CROWN 439 (1869).

[9] 2 GROSE, MILITARY ANTIQUITIES 126 (1788); 1 CLODE, *op. cit. supra* note 8, at 445.

[10] 2 GROSE, *op. cit. supra* note 9, at 137; 5 J. ARMY HISTORICAL RESEARCH SOC'Y 202 (1926).

At this stage, it may be pertinent to point out that the general article was not native to English military law. No trace of any such article may be found in the Ordinances of War issued before the seventeenth century. A hallmark of the earlier Ordinances had been their certainty. The remarks of Lord Chief Justice Cockburn in *R. v. Nelson and Brand* in 1867 bear repeating. Speaking of the Ordinances of Richard II, he stated: "They form an elaborate code minute in its details to a degree that might serve as a model to anybody drawing up a code of criminal law." [11] They recognized that soldiers should be punished only for offenses which they knew. The Ordinances of Henry VIII charged the captains "to cause the same twyse or ones at the least in euery weke holly to be redde in the presence of theyr retinue." [12]

The void left by the disappearance of marshal law was filled in the first half of the seventeenth century by Continental law. The Swedish Articles of Gustavus Adolphus issued in 1621 contained a general article in the following terms:

> 116. Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction for it.[13]

Just as the council of war was a reversion in time of stress and doubt to the General's equivalent of the Curia Regis, so the stresses and doubts engendered a preference for custom as understood by the council of war rather than express and certain articles. But it must be kept in mind that the practice was less objectionable because the General was given power by his commission to issue articles of war. His power to issue orders included a power to prescribe offenses.

The general article in the latter half of the seventeenth century was substantially similar to the 1640 and 1642 versions. According to Walton, the Articles provided: "68. All other faults, misdeameanours, disorders and crimes not mentioned in these articles, shall be punished according to the Law and Customs of War, and discretion of the Court Martial." [14] The concept of conduct to the prejudice was introduced at some stage between 1700 and

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[11] O'SULLIVAN, MILITARY LAW AND THE SUPREMACY OF THE CIVIL COURTS 7 (1921).

[12] 7 J. ARMY HISTORICAL RESEARCH SOC'Y 226 (1928).

[13] WINTHROP, MILITARY LAW AND PRECEDENTS 914 (2d ed. reprint 1920).

[14] WALTON, HISTORY OF THE BRITISH STANDING ARMY (1660–1700) 817 (1894).

1765. In the Articles for 1765, it took the following form: "All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-Martial and be punished at their Discretion." [15]

The circumstances under which the concept was introduced into the general article can only be, at present, a matter for conjecture. Three points may be noted. Winthrop pointed out that the punctuation of the article indicated unmistakably that the words "to the Prejudice of good Order and Military Discipline" qualified crimes not capital as well as disorders and neglects.[16] Snedeker has drawn attention to the difference between the British military general article and the naval general article which was not qualified by the concept of conduct to the prejudice.[17] He has also drawn attention to an interesting difference of opinion between the U.S. Supreme Court in *Dynes v. Hoover*[18] and *Smith v. Whitney*[19] and the Attorney General[20] on the interpretation of the American naval article.[21] The Attorney General read the concept of conduct to the prejudice into the naval article which, like its British predecessor, did not specifically incorporate it. Thirdly, it may be noted that the general article was peculiar to the Articles of War and was not restated in the Mutiny Act even as late as 1872.

Applying these points to the results of the constitutional conflicts of the seventeenth century, it seems possible to draw the conclusion that the concept was introduced to reconcile the exigencies of overseas service with the tenets of the common lawyers. Although the scope for the trial of crimes by courts-martial in England in time of peace was narrow and contrary to the successful beliefs of the seventeenth century, wider provision was necessary for overseas service. Military law could only be justified on the ground of necessity. The legitimacy of the general article would be strengthened by limiting it to those offenses which impaired the efficiency of the army. There had never been the same objection to a standing navy and the obvious requirements of discipline on board ship justified an unqualified general article.

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[15] WINTHROP, *op. cit. supra* note 13, at 946.
[16] *Id.* at 723.
[17] SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 477–479 (1953).
[18] 61 U.S. (20 How.) 65 (1857).
[19] 116 U.S. 167 (1886).
[20] 16 OPS. ATTY GEN. 578 (1880).
[21] SNEDEKER, *op. cit. supra* note 17, at 480–482.

If the conclusion is valid, it may be said that the Attorney General was a good common lawyer but the Supreme Court preferred to be accurate.

The general article varied little in the next hundred years; acts and conduct were included to supplement disorders and neglects. But it was not until the first Army Act in 1881 that the final stage in its evolution was reached. Civil offenses were split off from the general article. Section 40 of the Army Act dealt solely with acts, conduct, disorders and neglects to the prejudice of good order and military discipline. Section 41 dealt with the offenses wheresoever committed which were crimes under English law. The British general article does not now deal with civil offenses as does the American; it does not include the American concept of conduct bringing discredit upon the armed forces.

III. THE AMERICAN GENERAL ARTICLE

The evolution of the American article is too well known to require restatement.[22] However, there are two minor points on which British military legal history may be relevant.

Snedeker traces the discredit sector of the general article to the Court of Chivalry.[23] The evidence does not support this conclusion. Many notable authorities have expressed the opinion that the Court of Chivalry was the forerunner of the court-martial. This opinion has been challenged by G. D. Squibb, Q.C., whose recent researches have thrown much light on the court of the constable and marshal,[24] and who argued successfully before Lord Chief Justice Goddard as surrogate for the Earl Marshal in *Manchester Corporation v. Manchester Palace of Varieties Ltd*,[25] that the heraldic jurisdiction of the Court of Chivalry survived into the present century. Lord Goddard based his decision on *communis opinio* among lawyers as evidence of what the law was. Although Squibb's thesis may be challenged on the ground that it is contrary to the *communis opinio*, it has not yet been disproved.

Even if the Court of Chivalry was the forerunner of the court-martial, general offenses against honor were not incorporated in the early codes. The key offense against honor and one which preceded the discredit sector of the general article is conduct unbecoming an officer and gentleman. The British counterpart,

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[22] See WINTHROP, *op. cit. supra* note 13, at 720; SNEDEKER, *op. cit. supra* note 17, at 477–480; 10 MIL. L. REV. 70–78 (1960).

[23] SNEDEKER, *op. cit. supra* note 17, at 476.

[24] SQUIBB, HIGH COURT OF CHIVALRY (1959).

[25] [1955] P. 133 (C.A.).

behaving in a scandalous manner unbecoming the character of an officer and a gentleman, emerged between 1700 and 1765. It is not included in the Articles of War 1660–1700;[26] it is included in the Articles for 1765.[27] Like the general article, it was an offense created by the Articles of War and was not re-stated in the Mutiny Act even as late as 1872. There can be little doubt that it was designed to permit the enforcement of officer standards independently of the general article. Officers and men were drawn from different strata of society and the system of purchasing commissions was used to ensure that officers were drawn from a particular stratum.[28] There is some authority for attributing the discredit sector of the general article to the Supreme Court.[29]

Captain Hagan has drawn attention to the interesting conflict between the decisions of the Court of Military Appeals in *United States v. Herndon*[30] and *United States* v. *Grosso*.[31] In the former case, the court considered a conviction under the general article of unlawfully receiving government property. The conviction had been held invalid by a Naval Board of Review which took the view that the offense, although not described as such in the specifications, must be regarded as a crime not capital and, as such, an offense against a separate act of Congress, title 18, United States Code, section 641; that an offense against section 641 must allege that the accused intended to convert the property to his own use or gain; and that the failure to include this in the specifications was a fatal defect. The Court of Military Appeals upheld the conviction on the grounds that receiving amounted to conduct to the prejudice of good order and military discipline or to conduct of a nature to bring discredit on the armed forces no less than to a crime not capital; and that while the intent to convert may be an essential element where the conduct was assessed as a crime not capital, it was not an essential element under the other sectors of the general article. In *United States v. Grosso*, a conviction under the general article for a violation of section 249 of the Penal Code of California was set aside. The court held that, as the crimes not capital sector of the general article did not apply to offenses under state laws, it must fall, if

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[26] WALTON, *op. cit. supra* note 14, at 808–820.

[27] WINTHROP, *op. cit. supra* note 13, at 945.

[28] 2 CLODE, MILITARY FORCES OF THE CROWN 62, 86 (1869).

[29] NCM 58–00264, Grose, 26 CMR 740 (1958). But it should be noted that the statement in *Smith v. Whitney* was specifically related to officers. See 116 U.S. 167, 183 (1886).

[30] 1 USCMA 461, 4 CMR 53 (1952).

[31] 7 USCMA 566, 23 CMR 30 (1957).

at all, within the other sectors of the general article; and that as the law officer did not instruct on the other sectors, his instruction was inadequate.

Presumably, since the latter decision, it has been necessary for the prosecutor to specify the sector or sectors of the general article under which he is proceeding so that there is no risk that the instructions of the law officer will be incomplete. Although in *United States v. McCormick*,[32] the court again followed the flexible approach of *United States v. Herndon*, the former decision was based on article 59 and the absence of any material prejudice. If this change has occurred, it can be reconciled as an inevitable stage in the transition in military law from a layman's law to a lawyer's law. It is difficult for the modern military lawyer to appreciate how much military law has changed in the last hundred years. A comment made by General Sir Charles Napier on a court-martial referred to him for confirmation as Commander-in-Chief in India during the first half of the last century illustrates the extent of the change.

> I am surprised that the Court permitted the Deputy Judge Advocate to hold such dictatorial language as he did. In addressing the Court as prosecutor, he says, "I have to add, that if the Court convict the prisoner under the 1st charge, they should acquit him under the 2nd charge, and vice versa." This is the language of a learned Judge from the Bench instructing an ignorant jury, and not that which becomes a young Officer to a Court Martial, composed of Officers, the youngest Captain on which is ten years his senior in the service, and probably, his superior in knowledge of military law . . . .[33]

One looks in vain in the earlier British textbooks such as McArthur, Tytler, Simmons and Clode[34] for an analysis of the general article comparable to that of Winthrop. The mechanics of an offense, the bread and butter of the modern military lawyers, are, so far as British military law is concerned, largely a development of the present century. It was not the practice one hundred years ago to allege in a charge or specification the breach of a specific article of war. Simmons stated in 1863:

> As a general rule it is desirable to follow the wording of the article, but it is not necessary that a charge should be couched in the terms of any

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[32] 12 USCMA 26, 30 CMR 26 (1960).

[33] MAWSON, RECORDS OF THE INDIAN COMMAND OF GENERAL SIR CHARLES NAPIER 124–125 (1851).

[34] MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS-MARTIAL (4th ed. 1813); TYTLER, ESSAY ON MILITARY LAW (3d ed. 1814); SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL (5th ed. 1863); CLODE, *op. cit. supra* note 28; CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW (1872).

> appropriate article of war, unless it be desired to induce the special punishment declared by such article. It is, however, necessary that the crime, as laid, should be clearly cognizable under some or other of the articles of war, provision of the mutiny act, or other statute referring to the jurisdiction of courts martial; and no court martial ought to proceed to trial until they have satisfied themselves of their competence to entertain the charge.[35]

There was as much latitude in findings as in charges. The present British rule on special findings is as follows:

> Where the court are of the opinion as regards any charge that the facts which they find proved in evidence differ from the facts alleged in the particulars of the charge, but are nevertheless sufficient to prove the offence stated in the charge and that the difference is not so material as to have prejudiced the accused in his defence, the court may, instead of recording a finding of not guilty, record a finding that the accused is guilty of the charge subject to any exception or variation which they shall specify in the finding.[36]

This rule follows identically the substance of the Criminal Procedure Act 1851.[37] Its incorporation in military law may be due in part to the emphasis given to this Act by Simmons in his textbook.[38] But it is clear from earlier passages in Simmons' book that a much wider rule had obtained in military law for many years previously.[39] And it is also clear from Colonel Carey's unpublished work on military law that the present rule was not adopted until 1881. Writing about the offense of fraudulent misapplication in 1877 in a work intended for official publication, Carey stated: "It might, however, be that the court was satisfied of the deficiency, and yet considered that it arose from misconduct, wilful neglect, or accidental carelessness. In such a case a finding might be recorded of 'guilty' except the words 'disgraceful conduct' and 'fraudulent'. . . . " Such a variation exceeds the present British and American rule. If British military law affords a reliable guide, it may not be reasonable to expect that the wide tolerances allowed to laymen will be extended to lawyers.

IV. COURT-MARTIAL APPEAL COURTS

Before turning to the mechanics of the general article, it is convenient to consider the role of appeal courts. The English Courts-Martial Appeals Court was constituted by the Courts-Martial (Appeals) Act 1951. Although the Act followed from

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[35] SIMMONS, *op. cit. supra* note 34, at 150.
[36] I MANUAL OF AIR FORCE LAW 500 (1956 ed.).
[37] 14 and 15 Vict. c. 100.
[38] SIMMONS, *op. cit. supra* note 34, at 320.
[39] *Id.* at 238.

the recommendation of the Army and Air Force Courts-Martial Committee 1946 that an appeal court be established, the Committee's views on the constitution of the court were not adopted. The Committee specifically recommended that the court of appeal should not be the Court of Criminal Appeal, and that it should be composed of the Judge Advocate General and Judge Advocates. It also recommended that the Lord Chancellor should form a panel of King's Counsel willing to serve on the court should occasion arise.[40]

In a decision which has had far reaching implications, the Act appointed the Lord Chief Justice and the puisne judges of the High Court, among others, as judges of the Courts-Martial Appeal Court. In practice, the judges who sit on the Court of Criminal Appeal also sit on the Courts-Martial Appeal Court. The serviceman may appeal to the same court as the civilian. The Act made provision for a further appeal to the House of Lords on the certification of the Attorney General that the decision involves a point of law of exceptional public importance. One appeal recently went to the House of Lords.[41]

The Act also adopted the principles governing the Court of Criminal Appeals. It followed almost verbatim the provisions of the Criminal Appeal Act 1907. The 1951 act provided:

> 5(1) . . . the Court shall allow the appeal if they think that the finding of the court-martial is unreasonable or cannot be supported having regard to the evidence or involves a wrong decision on a question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

One final point may be noted. The Act provided in section 16: "Where the conviction of a person by court-martial for an offence has been quashed under this Part of this Act, he shall not be liable to be tried again for that offence by a court-martial or by any other court." It has not been decided whether this section excludes the narrow power of the Court of Criminal Appeal to permit a re-trial where the trial court lacked jurisdiction.

The English Act provided a general model for the New Zealand Courts-Martial Appeals Act 1953 which came into force in 1955

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[40] Army and Air Force Courts-Martial Committee, CMD. No. 7608, at 31 (1946).

[41] Cox v. Army Council [1962] 1 All E.R. 880.

and the Australian Courts-Martial Appeals Act 1955 which came into force in 1957. In each case, there were local variations. The New Zealand Act gave the Appeal Court a general power to direct a re-trial consistent with the civil law. Although it appointed, among others, the judges of the Supreme Court to be the judges of the Courts-Martial Appeals Court, in practice the Court has consisted of a mixed panel of judges, magistrates and counsel. The Australian Act differed from the English in not appointing any civil judges to the Courts-Martial Appeal Tribunal. In practice, the Tribunal, with the exception of the President who subsequently became a judge, has consisted of counsel, and predominantly, Queen's Counsel.

The Canadian Courts-Martial Appeal Board preceded the English Court. It was constituted by the National Defense Act 1950. Unlike the English Act, it did not specify the principles to be followed by the Board although it permitted the Board to disallow an appeal if there had been no substantial miscarriage of justice.[42] It also gave the Board a general power to order a retrial.[43] As to the composition of the Board, the Chairman was required to be a judge of the Exchequer Court or of a superior court of criminal jurisdiction, but it was sufficient if the members were barristers of not less than five years standing.[44] In practice, the Board consisted predominantly of Queen's Counsel. In 1959, the National Defense Act was amended and a Court-Martial Appeal Court constituted as a superior court of record and as a replacement of the Appeal Board. The Court is composed of judges of the Exchequer Court or a superior court of criminal jurisdiction.

It is not surprising that Lord Chief Justice Goddard, in the second appeal to come before the English Court, *R. v. Condon,* stated: "It is just as well, as this Court-Martial Appeal Court has very recently been established that appellants who appeal against their convictions should know that the Court can only act upon the same principles as we act in the Court of Criminal Appeal." [45] Several years later, these remarks were elaborated by Lord Goddard in *R. v. Linzee.* He described the function of the Court in the following terms:

> I want, however, to point out what are the functions of this court, because I am not sure that persons who are subject to military law and

[42] Sec. 193.

[43] Sec. 191.

[44] Sec. 190.

[45] 36 Crim. App. R. 130, 131 (1952).

who appeal to this court altogether understand them. We do not try anybody, and cannot. We sit merely as a court of appeal, and as a court of appeal our duty is this: First, we have to see that the finding is one that is possible in law. Then we have to see that there was evidence before the court-martial which supported the finding which they gave. Then we have to see, if any question of law arose, whether the law was correctly laid down by the Judge-Advocate, who nowadays I think in every case of a general court-martial, and in most cases of district courts-martial, is a qualified lawyer. We have to see that the summing-up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the evidence for the prosecution and the nature and evidence of the defence. It is not necessary to go into every point which the defence has raised. It is not necessary to go into the evidence of every witness. The court has to be reminded of the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. It is not our function to re-try the case because we do not see the witnesses, and no court of appeal does re-try a case in the sense of substituting themselves either for a jury in a civil case or for a court-martial in the case of one of the Services.[46]

The New Zealand Appeal Court has adopted a similar approach. In *R. v. Taare*, the Court stated: "On the third ground of appeal, we agreed with counsel for the Army Board that the Court should act on the same principles as those on which the Court of Appeal acts in considering appeals under the Criminal Appeal Act 1945; see R. v. Condon ((1952) 36 CR App R 130)." [47]

The Australian Courts-Martial Appeal Tribunal in the first appeal to come before it, *R. v. Schneider*,[48] after quoting with approval Lord Goddard's statement in *R. v. Linzee*, added: "We think that these words also describe the function of the Tribunal under the Courts-Martial Appeals Act 1955."

There is an apparent anomaly in applying the civil approach to a court-martial, the members of which are in theory and were, in practice, unlike the jury, the judges of the law as well as of the fact. But even if their character had permitted a different approach, it may be doubted whether these Appeal Courts would have had the inclination to discard well-established legal principles and to develop new appellate techniques. In any event, a request for a different approach would have merited the simple answer that a court-martial is required to endorse in the proceedings any disagreement with the judge advocate about the law, and that in the absence of any such endorsement, the court-martial must be taken to have adopted the views of the judge advocate.

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[46] 40 Crim. App. R. 177, 179 (1956).

[47] [1955] N.Z.L.R. 1050, 1054.

[48] No. 1/57, unreported.

One concession was made by the English Court to service requirements. In three cases, the Court has heard appeals from trials at which there was no judge advocate. In *R. v. Grant.*,[49] it was argued for the appellant that the prosecutor had misstated the law in his closing address. Lord Goddard, in dismissing the appeal, adopted a cavalier approach. This was a court-martial sitting in the desert, and the ordinary rules could not be applied. The prosecutor was not a qualified lawyer and could not be expected to know the law. His closing address could not be treated as a direction. A permanent president presided and he could be trusted to use his common sense. This was a simple case and the sort of case that any bench of magistrates was competent to try and did try every day of the week. In any event, there had been no miscarriage of justice.

The concession was short lived. With Lord Parker as Lord Chief Justice, palm tree and desert justice has had to bow, at least temporarily, to the logic of the appellate function. In *R. v. Walker*,[50] an appeal was allowed, one of the two grounds being a serious misdirection by the prosecutor in his closing address. In *R. v. Phillips*,[51] the transcript of the trial did not include the closing address of the prosecutor. The appeal was stood over until notes of the address were supplied by the prosecutor, and it was not dismissed until the Court came to the conclusion that it contained no misdirection.

The Canadian Courts-Martial Appeal Board and Court have followed a similar approach to the English Court, but with minor differences which are significant in relation to the general article. The more obvious difference stemmed from the provision of the Canadian Code that a judge advocate is not bound to sum up unless requested to do so by the president. In *Goleski v. R.*[52] and *Blair v. R.*,[53] the Board held that the failure of the judge advocate to sum up when not so requested was not a prejudicial error. This judicial freedom was inconsistent with the appellate function and was soon qualified. In *Doutre v. R.*,[54] the Board held that the right of an accused to have every defense advanced by him, however weak, put adequately by the judge to the jury was so paramount a principle of Canadian law that a judge advocate

[49] No. 10/1952, unreported.
[50] No. 5/1961, unreported.
[51] No. 20/1961, unreported.
[52] 1 C.M.A.R. 81.
[53] 1 C.M.A.R. 107.
[54] 1 C.M.A.R. 155.

always has the specific duty of seeing that the theory or basis of every defense is put before the court-martial, even though he is not requested to sum up. A further and more significant difference has been the degree to which the Board and also the Court have recognized the right of members of a court-martial to apply their service knowledge. This point will be amplified later.

V. THE GENERAL ARTICLE AS A QUESTION OF LAW

Two quite separate and distinct approaches to the general article can be discerned in both American and British military law. The earlier approach, and one which dates back to its original incorporation into military law in the seventeenth century, is to regard the general article as raising questions of law to be determined by the custom of the service. Under this approach, it was sufficient if the conduct in question was regarded as coming within the general article by the custom of the service. The more modern approach is to regard this as a question of fact and not of law. A court must be satisfied that the conduct proven does in fact prejudice good order and discipline, and if a court is not so instructed by the law officer, this may be a fatal defect. One is basically the layman's approach and the other the lawyer's approach. They are mutually inconsistent unless it is appreciated that each has its proper place in military law.

The approach of custom has long been recognized in military law. So far as British law is concerned, the strongest evidence consists of the terms of the early articles previously quoted. It is evident from Colonel Carey's work that prior to the first Army Act 1881 and the separation of civil offenses from the general article, it was the predominant approach. He stated:

> . . . . the term "to the prejudice of good order and military discipline" used in the 105th Article of War, is therefore merely an expression qualifying the first words of the article and explaining in a pointed manner that it is not intended to give courts-martial power to deal with civil offences which do not affect discipline or the interests of the service. In framing charges under the 105th Article of War there is no absolute necessity to use the preamble "to the prejudice of military discipline," though at times it is advisable to do so, especially when the offence is not so notoriously contrary to military rule that an accused might allege that he did not know under what article he was tried.

The introduction of the approach of fact has not displaced the approach of custom in the administration of military law. The footnotes to section 69 of the British Air Force Act 1955 in

the *Manual of Air Force Law*[55] list eleven examples of offenses commonly charged under the section. These examples are amplified in the specimen charges contained in the *Manual.*[56] While the members of a court could conceivably be expected to disregard their service knowledge that the offense before them falls traditionally within the section, and to treat it as a question of fact, it is none the less necessary for other purposes to indicate what falls within the section.

So far as American law is concerned, the list of offenses commonly falling within the general article given in Winthrop[57] is most comprehensive. The American *Manual* has a more comprehensive list of specimen charges or specifications than the British.[58] As might be expected, the Supreme Court in the last century endorsed the approach of custom in *Dynes v. Hoover,*[59] *Smith v. Whitney*[60] and *Swaim v. United States.*[61] However, the Court of Military Appeals has also recognized the approach. In *United States v. Kirksey,* the court in a unanimous judgement stated: . . . we cannot hold—in the absence of clear Code authorization or long established custom—that a *negligent* omission in this respect rises to the type of *dishonorable* conduct which is the gravamen of the offense in question."[62]

The value of the approach of custom at the appellate level has always been recognized by the Court of Military Appeals. In *United States v. Kirchner,*[63] the court was faced with the problem of deciding whether to follow the Army and Air Force custom which recognized an unlawful homicide through simple negligence as falling within the general article, or the Navy custom which was to the contrary. The Court cited not only Winthrop and the *Manual* but numerous decisions of boards of review prior to 1950. In *United States v. Herndom,*[64] the court fell back on Winthrop and JAG Opinions. In *United States v. Messenger,*[65] the Court fell back on Winthrop and earlier board of review decisions. In *United States v. Eagleson,*[66] the Court

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[55] Part 1 at 314 (1956 ed.).
[56] *Id.* at 314–317.
[57] WINTHROP, *op. cit. supra* note 13, at 726–732.
[58] MCM, 1951, at 488–495.
[59] 61 U.S. (20 How.) 65 (1857).
[60] 116 U.S. 167 (1886).
[61] 165 U.S. 553 (1897).
[62] 6 USCMA 556, 561, 20 CMR 272, 277 (1955).
[63] 1 USCMA 477, 4 CMR 69 (1952).
[64] 1 USCMA 461, CMR 53 (1952).
[65] 2 USCMA 21, 6 CMR 21 (1950).
[66] 6 USCMA 685, 14 CMR 103 (1954).

was content to say that conduct of the type in question had long been considered to fall within the general article; it merely cited the *Manual* as an authority for the statement. In *United States v. Hooper*,[67] the Court had to decide whether the public association with known sexual deviates fell within the general article. In deciding that it did, the Court relied on the fact that public association with notorious prostitutes had traditionally come within the general article, citing Winthrop and the *Manual*. It is not surprising that this pattern should emerge since the use of precedent is essential to judicial decision.

The Court, however, does not appear to have accepted the proposition that what is good for the goose is good for the gander. Trial courts are no less essential a part of the judicial system than appeal courts and no less entitled to the benefits of precedents. In a series of cases which commenced with *United States v. Grosso*, the Court so emphasized the necessity of the approach of fact at the trial level as to give rise to the criticism that it had usurped the court-martial function.[68] The main basis of the criticism is that the implications of the approach of fact at the appeal level have not been accepted. But if fact and custom both have a role to play, a necessary corollary is that the approach of custom must be allowed to operate at the trial level within its proper bounds.

In a characteristic dissent, Judge Latimer, in *United States v. Grosso*, stated:

> In connection with the enumerated offenses, it would be an act of sheer futility to require a court-martial to find what is obvious to everyone, namely, that the commission of such offenses has an adverse impact on the military service. The same consideration applies to this offense. I would, therefore, say that the law officer was not compelled to submit to the court-martial members the question of whether the false and malicious libel brought discredit on the Naval Service or impaired good government within it. No doubt he could have done so but the omission was not prejudicial.[69]

The interesting feature of this dissent is its recognition of the approach of custom at the trial stage. In *United States v. Frantz*, the court stated in a unanimous judgement:

> That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicitly included in the Table of Maximum Punishments of the Manual, supra, paragraph 127*c*,

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[67] 9 USCMA 637, 26 CMR 41 (1958).
[68] 10 MIL. L. REV. 78 (1960).
[69] 7 USCMA 566, 573, 23 CMR 30, 37 (1957).

> pages 224–227 . . . . A certain minimum element of indistinction remains which, in legislation of this entirely defensible . . . character, can never be expunged completely, and must be dealt with on a case-by-case basis.[70]

The problem of the general article is that it covers a wide range of offenses, recognized in varying degrees. Where an offense has clearly crystallized, the approach of custom may be adequate. Where an offense has not crystallized, the approach of custom is useful but must be supplemented by the approach of fact. This at once raises the logical difficulty that the same question should not be both one of law and one of fact.

This difficulty can be put into a clearer perspective by considering who is the censor morum at the trial level, the court or the law officer. The Canadian Court has settled for the court. At a trial on a charge of conduct to the prejudice of good order and discipline, the judge advocate on two occasions advised the court that they could use their general service knowledge. Early in the trail, in a brief statement on the general principles of law applicable to the case, he advised the court that it could apply its general military knowledge in deciding wether the conduct amounted to conduct to the prejudice. In his summing up, he stated:

> Note (G) is of interest to you for it provides that you may apply your general military knowledge to determine what is good order and discipline as it applies to the circumstances of the case before you and so come to a conclusion whether the act complained of is of a nature which may be considered prejudicial to good order and discipline . . . .

On appeal, the Candian Court considered that no objection could be taken to these statements.[71]

Service knowledge, like public policy, can be an unruly horse. If given too much scope, it becomes incompatible not only with the appellate process but also with the trial process. The point was well taken in an earlier Canadian case. In *Chenoweth v. R.*, the Board held that the conviction leaned so heavily on general service knowledge that it could not be sustained. One member of the Board stated:

> Any extension of this principle, unless such extension were most carefully and completely defined, would lead to an accused before a Service tribunal being in the very unfair position of having to speculate on what usage, what fact or what matter, particulars of which were never given to him, and which custom, matter or fact that has not been given in evidence or even argued at trial, might be used to convict him. He would not even be

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[70] 2 USCMA 161, 163, 7 CMR 37, 39 (1953).

[71] R. v. Smith, No. 18/61, unreported.

> in a position to know what evidence he should adduce in his defense or on what grounds he should argue. Furthermore appellate Courts, faced with a very incomplete record in some cases, might be obliged to speculate on what possible unestablished facts the accused might have been found guilty by the court martial.[72]

In two later cases, *Hryhoriw v. R.*[73] and *R. v. Owen*,[74] the Board again considered the use of general service knowledge. In the latter case, the Board stated:

> . . . in the present appeal, as my brother Alexander did in the Hryhoriw appeal, I distinguish this case from the judgments of my brother Addy and myself in the Chenoweth appeal, 1 CMAR, 253; in the Chenoweth case the judicial notice of general service knowledge introduced a highly speculative element because of inadequate and meagre prosecution evidence; in the present case there is a clearly established set of facts to which the general military knowledge of the court can be applied without introducing an element of difficult speculation for appellant.

In *R. v. Jarman*,[75] the English Court allowed the use of general service knowledge in circumstances compatible with the Canadian test.

It may be doubted whether the Canadian approach is entirely valid. General service knowledge is something different from the custom of the service, particularly if Winthrop's definition is accepted.[76] Moreover, it seems no less necessary to permit argument at the trial stage than at the appeal stage on the question whether particular conduct is recognized as falling within the general article under the custom of the service. This can best be achieved by recognizing that with the transition, the custom of the service can safely be allowed to become the common law of the service or, at least as Mr. Justice Story many years ago thought it may be fitly described, the customary military law.[77] The court and the law officer would then both become censors morum with the traditional division of responsibilities recognized by the civil law. It should not be overlooked that the classic statement of the Supreme Court on the customary approach to the general article recognized that the content of the article was well known not only to practical men in the Navy and Army but also to those who studied the law of courts-martial.[78]

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[72] 1 C.M.A.R. 253, 265.

[73] 1 C.M.A.R. 277.

[74] No. 18/61, unreported.

[75] No. 21/53, unreported.

[76] WINTHROP, MILITARY LAW AND PRECEDENTS 42–43 (2d ed. reprint 1920).

[77] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35 (1827).

[78] Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857).

VI. THE GENERAL ARTICLE AS A QUESTION OF FACT

It may be inferred from the decision in *United States* v. *Grosso*[79] and later cases[80] that the application of the approach of fact as a general rule is a recent development in America. It was applied by British military law as a general rule prior to 1939. The footnotes to section 40 in the 1939 edition of the *Manual of Air Force Law* stated: ". . . and a court is not warranted in convicting unless of the opinion that the conduct, etc., proved was to the prejudice both of good order and air force discipline, having regard to its nature and to the circumstances in which it took place."[81] It may well be, of course, that both American and British military law recognized this approach in a more limited application many years previously, since it is otherwise difficult to explain the comprehensive discussion in Winthrop of the terms "good order" and "military discipline."[82]

To the British military lawyer, there has been, in the American approach to the general article, a failure to accept the implications of the approach of fact at the appellate level. It may be that the earlier boards of review are as much responsible for this development as the Court of Military Appeals. That such a failure exists becomes apparent by comparing the remarks of Lord Tucker in *Shaw v. Director of Public Prosecutions*[83] and the remarks of the board of review in CGCM 9813, *Lefort*.[84]

Lord Tucker thought that the jury must remain the final arbiters since they alone could adequately reflect the changing public opinion. To establish that such an approach was consistent with the common law, he cited the following remarks of Justice Parke in *Mirehouse v. Rennell*[85] in 1833:

> The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those

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[79] 7 USCMA 566, 23 CMR 30 (1957).

[80] United States v. Williams, 8 USCMA 325, 24 CMR 135 (1957); United States v. Gittens, 8 USCMA 673, 25 CMR 177 (1958); United States v. Lawrence, 8 USCMA 732, 25 CMR 236 (1958).

[81] At 252.

[82] WINTHROP, *op. cit. supra* note 76, at 723.

[83] [1961] 2 All E.R. 446.

[84] 15 CMR 596 (1954).

[85] 1 Cl. & Fin. 527, 546 (1833).

> rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, or to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.[86]

In CGCM 9813, *Lefort*, the board of review stated:

> The coverage of Article 134 is, of course, not limited to those offenses heretofore recognized in reported cases. The law is not static. New and different offenses may become established as triable under Article 134. There was a time when the possession of narcotics was not so recognized. The time may come when the possession of the implements of their usage may be deemed to warrant court-martial cognizance. It is not yet here.[87]

It is clearly necessary for appellate courts to exercise some control over the general article. That it became known as the "Devil's Article" indicates the possibilities of its abuse. No one could cavil at the oft-quoted statement that it is not a catch-all. However, so long as appeal courts follow the approach of *Lefort*, the criticism that they have usurped the function of the court-martial remains valid. The question is not whether appeal courts should exercise control, but how they should. It may be pertinent to ask what are the rules of law derived from legal principles and judicial precedents which are or should be applied to new combinations of circumstances within the general article. It has been noted previously that the Court of Military Appeals appreciates the approach of custom at the appeal level. But in new combinations of circumstances where the approach of custom cannot be applied or adapted, what are the rules?

Lord Reid in *Shaw v. Director of Public Prosecutions* pointed out that normally the meaning of words is a question of law for the court. Although it may be admitted that this approach may be insufficient to contain the general article, it should not be overlooked that little judicial attention has been given to the meaning of the words "good order" and "military discipline." There is a notable and similar lack of precision in the meaning given in the *Manuals* to the phrase "good order," in both British and American military law. The British *Manual of Air Force Law* states of good order: "As used in this section these words are wide enough to include good order in the sense in which the words would be understood in civil life and applicable to civilians, and

[86] [1961] 2 All E.R. 446, 465.

[87] 15 CMR 596, 597 (1954).

in the same sense in which they would be understood in air-force life as applicable to members of an air force."[88] This statement may be compared with that given in Winthrop:

> Inasmuch, however, as civil wrongs, such as injuries to citizens or breaches of the public peace, may, when committed by military persons and actually prejudicing military discipline, be cognizable by courts-martial as crimes or disorders, the term "good order" may be deemed, in cases of such wrongs, to include, with the order of the military service, a reference to that also of the civil community.[89]

Winthrop's statement acknowledges that good order means the good order of the Army, Air Force and Navy rather than the good order of the community at large. It can readily be proved that this is correct historically,[90] but this merely makes it more difficult to explain why civil criteria have been superimposed. Was it designed to enlarge the ambit of the general article so that cognizance could be taken of a wider range of civil offenses? And if this is so, now that British military law takes cognizance of all civil offenses, have civil criteria any value?

An equally fertile field and one which may be sufficient to contain the general article is an examination of the principles underlying or associated with the legal definition of good order and military discipline. Is the British *Manual of Air Force Law* correct in saying that conduct prejudicial to military discipline is automatically prejudicial to good order?[91] Is it correct, having regard to the meanings which can be given to the phrase "good order," in saying that the converse does not hold good?[92] Is it correct in saying that any conduct which prejudices the reputation of the service prejudices military discipline?[93] Was Mr. Justice Gray correct in saying in *Smith v. Whitney* that so far as conduct which tends to bring disgrace and reproach on the service is concerned, it does not matter whether it occurred in the performance of military duties, or in a civil position, or in a social relation, or in private business?[94] Was Winthrop correct in saying that all enumerated offenses in the code are automatically offenses prejudi-

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[88] At 313 (1956 ed.).

[89] WINTHROP, *op. cit. supra* note 76, at 723.

[90] See Articles of War for 1765, Article V, Section IX, and Article XVI, Section XIV, WINTHROP, *op. cit. supra* note 76 at 937 and 940. See also GRIFFITHS, NOTES ON MILITARY LAW 154–155 (1841).

[91] At 313 (1956 ed.).

[92] *Ibid.*

[93] *Ibid.*

[94] 116 U.S. 167, 183 (1886). Compare Judge Brosman's language in United States v. Snyder, 1 USCMA 423, 425, 4 CMR 15, 17 (1952).

cial to good order and discipline?[95] What rules can be safely distilled from the mass of conduct recognized by the appeal courts or by the common law of the service as coming within the general article? For instance, in the pioneering days, the scope of the article was recognized as being greater on the frontier.[96] Can this be projected internationally where the civil courts may lack jurisdiction or where jurisdiction is waived or where the civil courts merely lack the inclination?[97]

One minor rule has been established by the English court. In *R. v. Phillips*,[98] it was argued that the appellant's conduct, indecent behavior with another soldier, could not be said to have prejudiced good order and discipline since there was no evidence that anyone had observed it. This argument was rejected and it may be inferred that offenses committed in semi-privacy within a base are within the general article.

A rule which has long been recognized by American military law but which has not been specifically adopted by British military law is that the prejudice to good order and discipline must be direct and not remote.[99] This rule has been applied by the Court of Military Appeals.[100]

A more important rule and one increasingly applied by the Court of Military Appeals is the pre-emption rule. It was stated in narrow terms in *United States v. Norris*.[101] The accused had been charged with larceny under Article 121. He was found guilty in the alternative of wrongful appropriation. He had pleaded guilty to taking without authority under the general article, but the law officer advised the court that he could not be found guilty of an offense other than larceny or wrongful appropriation. A board of review set aside the conviction of wrongful appropriation and substituted a conviction under the general article. The Court of Military Appeals held that there was no offense of wrongful taking under the general article because in legislating specifically for larceny and wrongful misappropriation, Congress had intended to cover the whole field.

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95 WINTHROP, *op. cit. supra* note 76, at 384. See ACM 15332, O'Neal, 26 CMR 924 (1958).

96 *Id.* at 725.

97 44, GROTIUS SOCIETY, PROBLEMS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 21–22 (1958–1959).

98 No. 20/1961, unreported.

99 WINTHROP, *op. cit. supra* note 76, at 723.

100 United States v. Holiday, 4 USCMA 454, 16 CMR 28 (1954).

101 2 USCMA 236, 8 CMR 36 (1953).

It is significant that the court expressly commented in its judgment: "We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134." [102]

The disallowed rule had been stated by Winthrop in very wide terms:

> It is to be observed of the term "not mentioned in the foregoing articles," that it embraces not only offences wholly distinct from and outside of previous designations and enumerations, but also, (1) acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter, —as, for example, the disrespectful behaviour to a superior who is not a commander . . . . [103]

It is not surprising that it was disallowed. As noted earlier, it may not be reasonable to expect that the wide tolerances allowed to laymen will be extended to lawyers.

However, in *United States v. McCormick*, the court refused to admit the connection between the pre-emption rule and its predecessor, and gave it a new twist by applying it equally to attempts to bring within the general article specific offenses with added elements. It may be inferred from this decision that the pre-emption rule will be a major weapon used by the Court of Military Appeals to contain the general article.

Judge Ferguson in this case sought to support his judgment with military history. He stated:

> The statute expressly excepts from its coverage conduct "not specifically mentioned in this chapter" and each of the general articles which preceded it, ranging backward through history to those extant in the British Army, were similarly intended only to provide a general remedy for wrongs not elsewhere provided for.[104]

This is undoubtedly an accurate statement but it has little connection with the pre-emption rule.

British military law would not contain the offense of stealing from a comrade as a specific offense if the pre-emption rule had a historical basis. This offense developed under the general article.[105] The offense of improper possession, which corresponds in some degree with the American offense of taking without

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[102] *Id.* at 239, 8 CMR at 39.

[103] WINTHROP, *op. cit. supra* note 76, at 725–726.

[104] 12 USCMA 26, 28, 30 CMR 26, 28 (1960).

[105] SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL (5th ed. 1863).

authority, has long been recognized as falling within the British article; and the fact that it is a lesser analogous offense is not regarded as of any consequence. The emergence of the offense of stealing from a comrade and the recognition of improper possession as an offense within the general article do not support the pre-emption rule. Nor do they in themselves support the earlier rule stated by Winthrop.

British military law has not recognized the pre-emption rule, and this has been confirmed by the English Court in. *R. v. Phillips.*[106] The appellant had been convicted under the general article of indecent behavior. It was argued on his behalf that he should have been charged under section 70 with the civil offense of indecent assault. The court stated:

> It may well be that what happened was in law an indecent assault, but even on the assumption that it was, it can only be a rule of practice, and a very good rule of practice and not a rule of law, that the charge should be laid under Section 70 rather than under Section 69. Quite clearly it should have been, on the basis that there was an indecent assault, laid under Section 70, in which case there would have been a Judge Advocate, but the Court is quite satisfied that the fact that it was preferred under Section 69 in no way justifies them in interfering with the conviction.

The inherent danger of the pre-emption rule is that it inhibits the application of legal principles and judicial precedents to new combinations of circumstances. This is well illustrated by an Australian problem. United States Air Force officers are serving with the RAAF on exchange duties, and it is essential for the performance of these duties that they should be able to give commands to Australian airman serving under them. The problem can be met in two ways: (1) by charging the disobedience of a command under the general article; or (2) by issuing a general order directing airmen to obey the commands of United States Air Force officers serving on exchange duties and by charging disobedience as a breach of the general order. Either course would be fruitless if the pre-emption rule applied. The Australian Parliament in 1939 in the Defence (Visiting Forces) Act made provision for the enforcement of commands given by attached officers. It applied only to the British Commonwealth countries. It could be argued that since Parliament has not seen fit to extend the Act to America, the Services cannot remedy the deficiency. A dicta of the present Chief Justice of the Australian High Court, Sir Owen Dixon, can be used to dispel the argument. In *Chow Hung Ching v. R.*, he stated:

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[106] No. 20/1961, unreported.

> The realities of modern war make it almost necessary that the authority of the Crown should suffice, without invoking the processes of legislation, to arrange effectively with foreign countries the conditions upon which their troops shall pass through or be stationed in places under the jurisdiction of the Crown.[107]

If it is correct to say that the effect on the general article of the transition in military law and the logic of the appellate process require the approach of custom and of fact to be supplemented with the approach of legal principle, a note of caution must be sounded. It is undesirable that legal principles of an inflexible character be developed. And it will be difficult to delineate the areas in which the approach of custom and the approach of principle should be used without a knowledge of military legal history.

The fact that the application of military law varies in peace and in war is well accepted. Offenses involving cowardice are predominantly war-time offenses. So, also, is desertion. It is not so well accepted that offenses vary in emphasis over the years and sometimes become dormant or submerged. British military law, for example, contains no specific offense with which a soldier who fails to keep his barracks room clean may be charged. If he were convicted under the general article, it could be argued that the offense had been recognized by the early Articles of War.[108] Similarly, the British code contains no specific offense with which a soldier who hires another to do his duty may be charged. If he were convicted under the general article, it could again be argued that this offense also was recognized by the early Articles of War.[109]

The outstanding merit of the judgment in *United States* v. *Kirksey* [110] lies partly in the fact that it is attuned to continuing currents in military law since the days of the Romans. There have been other cases before both the American and English Courts in which military legal history could have played a more effective part. It is possible that Judge Latimer could have strengthened his dissent in *United States v. Grosso* [111] by refering to Article 11 of Section XII of the Articles for 1765.[112] The proper remedy for a soldier who thought himself wronged was to complain to his Commanding Officer, who was required

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[107] [1948] 77 C.L.R. 449, 482.
[108] WINTHROP, *op. cit. supra* note 76, at 923.
[109] WINTHROP, *op. cit. supra* note 76, at 939.
[110] 6 USCMA 556, 20 CMR 272 (1955).
[111] 7 USCMA 566, 572, 23 CMR 30, 37 (1957).
[112] WINTHROP, *op. cit. supra* note 76, at 938.

to summon a court-martial to investigate the complaint. The soldier ran the risk of punishment if his complaint was false. Although the soldier's right to complain has undergone profound changes since then, it could be argued that the power of a court-martial to punish a false complaint is so well recognized that the failure of the law officer to instruct on the general article could not be regarded as a fatal defect.

VII. THE ROLE OF LEGISLATURES

Captain Hagan has suggested that Congress could play a useful part in spelling out offenses which have crystallized under the general article.[113] It is doubtful whether Congress or the British Parliaments would revise military legislation with the readiness which would be required. It is possible that the code would become unwieldy. It may also be unwise to write into the code offenses which have become unwritten. There is a danger that they may become too specific or extinct. The suggestion would have the merit of reducing the technical problems involved in the general article. But the more substantial problems are those dealing with offenses which have not yet emerged.

A more important role is that given to Congress by the Court of Military Appeals with the pre-emption rule. This rule well illustrates the divergent attitudes towards the general article. To those who regard the general article as "The Devil's Article," it is no more than an expression of the sovereignty of Congress or Parliament. To those who regard the general article as a useful weapon in punishing conduct contrary to the prevailing service ethic, it is merely an indication that the courts have become sterile.

In *United States v. McCormick*, Judge Ferguson stated:

> Nor is there any basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in Congress alone the power "To make Rules for the Government and Regulations of the land and naval Forces," United States Constitution, Article 1, Section 8. The President's power as Commander-in-Chief does not embody legislative authority to provide crimes and offenses.[114]

As in the case of his reference to military legal history, Judge Ferguson stated the position accurately but irrelevantly. It is not a matter for the Executive but a matter for service courts to say what offienses fall within the general article. It is a function which they have exercised since the seventeenth century, and a

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[113] 10 MIL. L. REV. 114 (1960).

[114] 12 USCMA 26, 28, 30 CMR 26, 28 (1960).

function which they may be expected to exercise more efficiently because of the efforts made by the Court of Military Appeals to make sure that courts-martial function as juries. With the advent of appeal courts, a modification of the approach is required. But it does not appear necessary to abdicate the role of censor morum. The safeguards are sufficient to permit the application to the general article of the classic statement of Mr. Justice Holmes on the interpretation of the American Constitution that it is a living organism and should be considered in the light of its past and its future.[115]

VIII. CONCLUSION

The transition in military law and the logic of the appellate function have required a modification of the earlier approach to the task of interpreting the general article. In previous centuries, the approach of custom or precedent predominated. Modern pressures have accentuated the approach of fact. Both have parts to play. There may also be a part for the approach of legal principles. The development of their roles calls for judicial rather than legislative skills

[115] Missouri v. Holland, 252 U.S. 416, 433 (1920).

MILITARY LAW IN SPAIN*

BY BRIGADIER GENERAL EDUARDO DE NO LOUIS **

I. INTRODUCTION

The general outline of Spanish miltiary law is akin to that of European continental law and is deeply rooted in the same broad factors which contributed to the formation of the laws of other European countries, in particular the Latin countries. Fundamentally it can be traced back to Roman law, with an admixture of Germanic law, to which were added the mutual influences of French and Italian law, especially with the advent of the House of Bourbon to the throne of Spain. Conversely it played a part in the formation of military law throughout Latin America, where it was in force at the time those countries achieved independence; some of the Latin American codes still preserve content and systematics almost identical to the Spanish Code of Military Justice.

II. SOURCES

Leaving aside medieval precedents, the direct antecedents of today's Spanish military law were the *Ordinances*, starting in the 16th Century, designed to regulate and organize standing armies.[1]

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[1] Among others, the following Ordinances deserve mention: those issued by Hernán Cortés in 1520 at Tazcatecle; by Charles V in 1536 at Genoa; by Alexander Farnesio in 1587 at Brussels; and for the Navy, apart from the

Codifying trends in the 19th Century gave rise to the first military laws which deal separately with court organization, punishment and procedure. These were: the Law Relating to the Organization and Attributions of Military Tribunals, dated March 10, 1884; the Army Penal Code, November 17, 1884, and the Law Relating to Military Trials, November 29, 1886, which were later recast and gathered together under the Code of Miltiary Justice for the Army, dating from June 25, 1890. Similarly the Navy was regulated by the (Fighting) Navy Penal Code, of August 24, 1888, and the Law Relating to the Organization and Attributions of Navy Courts, plus the Law Relating to Military Trials in the Navy, dating from November 10, 1894.

All this legislation was repealed upon the promulgation of the Code of Military Justice on July 17, 1945 which, with a number of later modifications, is the code in force today.

This is a very extensive law consisting of 1072 articles jointly applicable to all the armed forces. It is divided into three parts or treatises: I—Organization and Attributions of Military Tribunals; II—Penal Laws; and III—Military Procedures.[2] Thus it is the type of Code which not only lays down punishments but also relates to discipline, the organization of the courts and procedural standards, besides regulating such other questions as Courts of Honor for the discharge of officers and methods of making and removing entries in soldiers' records.

III. THE MILITARY LEGAL ORGANIZATIONS

In order to clarify later remarks some reference should be made at this point to the military legal organization[3] which, composed

old Ordinances of King Peter IV of Aragon in 1340, those of 1633. Under Bourbon rule, general Ordinances were issued, such as the Navy Ordinances of 1748 and 1793, and the Army Ordinances of 1768, which were of immense influence on Spanish military law.

[2] The Code of Military Justice is hereafter cited by its initials in Spanish, C.J.M.

[3] The institution of the Judge Advocate, a law expert, taking part in military justice and giving legal counsel to the military command, is of such long tradition in Spain that it seems to be connected with the first standing armies. There is mention of the Judge Advocate and his functions even in the Ordinances of Philip II, dated May 9, 1587, and in the Navy there is a record of the name of one Dr. Morcate, appointed on June 26, 1571 who was Judge Advocate to John of Austria in the squadron which won the battle of Lepanto against the Turks. The Judge Advocates General appointed by the King were chosen from lawyers who combined specialized knowledge both of war and law.

Thus it was that the Judge Advocates of the Spanish Armies contributed, with their theoretical and practical knowledge, to the formation of the then-

of legal experts, play a part in the operation of military justice and the counseling on legal matters of the military authorities and Ministries.

These individuals are recruited from persons holding the degree of Master or Doctor at Law; there is a competitive examination for entry into the Academy or special school [4] of each of the military Ministries (of Army, Navy or Air Force), where specialized instruction is given in military law and martial law. Candidates who pass this test go on to form part of the respective military legal organization, with military uniform and rank starting from Lieutenant Judge Advocate in the Navy and Air Force, and Captain Judge Advocate in the Army, rising to the rank of Counselor or Robed Minister, equivalent to Divisional General. As stated, each of the three military Ministries has its own military legal organization.

Apart from their judicial function referred to in this article, these organizations also give legal advice and interpret laws as regards administration and contracting of the military Ministries.

IV. COMPETENCE OF MILITARY JURISDICTION

In principle, ordinary jurisdiction is competent to deal with all criminal proceedings except those which are expressly attributed to some other jurisdiction. For this reason, in Spanish juridical language, ordinary jurisdiction is also termed *common jurisdiction.*

The exceptions which come under military jurisdiction are to be found in the Code of Military Justice.

There are three reasons or grounds for ruling that criminal proceedings are attributable to military jurisdiction: it may be the type of crime, the place where it was committed, or the person who committed it.

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emergent military law, and many of them were the precursors and founders of modern international law. Especially famous are the Italian Pierino Belli, Judge Advocate to the Duke of Alba and author of the work *De re militari et bello tractatus,* written in 1558 and dedicated to Philip II; and Baltasar de Ayala, Judge Advocate General of Alexander Farnesio's Army in Flanders and author of *De jure et officiis bellicis et disciplina militari,* written in 1581 and later mentioned in his work by Hugo Grotius.

The organization of the Juridical Corps in its present form dates for the Army, from the Decree of October 19, 1866; for the Navy, from the Decree of April 8, 1857; and for the Air Force, from the Decree of March 15, 1940.

[4] The training of the Army Judge Advocates and their professional development is undertaken in the School of Juridical Studies, dependent on the Army Ministry and located in Madrid.

Thus it can be seen that, in the Spanish legal system, military jurisdiction is competent to deal not only with crimes committed by service personnel but also those crimes containing elements which make them harmful to the interests of the armed forces, whether this be due to the type of crime committed, to the place where it was committed, or to the person responsible.

For this reason it is not unusual for civilians to be judged by military courts.

A. *COMPETENCE OWING TO THE NATURE OF THE CRIME*

As far as the nature of the crime goes, military jurisdiction is competent to deal with those proceedings brought against anyone for damage to, destruction or appropriation of supplies, arms, munitions and effects belonging to the military; for violence or injury to military authorities in the execution of their command or to armed units; for insulting the flag or military emblems and insignia; falsification of military seals or documents; adulteration or fraud in connection with Army supplies; piracy; and all other crimes contained in the Code of Military Justice or attributed by special law to military jusisdiction.[5]

In this respect it should be pointed out that the Code of Military Justice does not contain common crimes such as theft, injuries or violation, which are only to be found in the ordinary Penal Code, but, on the other hand, it does contain strictly military crimes which can only be committed by military personnel, together with other crimes that may also be committed by civilians, such as insults to or assaults of sentries or armed guards, destruction of military documents, spying, etc.

B. *COMPETENCE OWING TO THE SCENE OF THE CRIME*

As far as the scene of the crime is concerned, military jurisdiction is competent to deal with all those crimes [6] committed by any person in or on barracks, camps, vessels, arsenals, airports, or buildings where military personnel are quartered or military services are provided; at sea or on navigable rivers, in national or foreign merchants ships in Spanish ports or maritime zones; and in aircraft while flying in air space subject to Spanish sove-

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[5] C.J.M., art. 6.

[6] Except some specially mentioned offenses in Article 16 of the Code of Military Justice, to which we shall refer when dealing with competence owing to the identity of the responsible person.

reignty. In time of war or in besieged or blockaded places the military may also deal with crimes affecting security or defense, and, on territory which has been declared to be in a state of war, those common crimes included in the decrees issued by the military authorities.[7]

C. *COMPETENCE OWING TO THE IDENTITY OF THE RESPONSIBLE PERSON*

As far as the identity of the responsible person is concerned, military jurisdiction is competent to deal with all crimes committed by military personnel on active service or under mobilization, by prisoners-of-war, convicts serving sentences in military establishments, and persons actively engaged in a campaign with the armed forces.[8]

When the crime is a common one and therefore not included in the Code of Military Justice the military courts will apply the Penal Code.

However, these individuals are not subject to military jurisdiction if the crime committed is that of assault on, or lack of respect for, civil authorities; counterfeiting money; forging of signatures, stamps, identity documents, passports or other public non-military documents; adultery; rape; expulsion or desertion of family; insult or calumny not constituting a military offense; infringement of customs regulations, or those relating to supplies, transport or taxes; or common crimes committed during periods of desertion, in the exercise of a civilian post or committed before the culprit became a member of the Army.[9]

D. *DETERMINATION OF LEGAL COMPETENCE*

The Code, with regard to the injured party or interest, the place where the crime was committed or the person responsible, lays down rules for determining the competence of the jurisdiction of the Army, Navy or Air Force, within the general grouping of military jurisdiction.

Questions of competence arising between military jurisdictions are settled by the Supreme Council of Military Justice. Questions of competence arising between ordinary jurisdictions and military jurisdictions are settled by a joint board constituted in the Supreme Court of Justice of the nation.

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[7] C.J.M., art. 9.
[8] C.J.M., art. 13.
[9] C.J.M., art. 16.

The jurisdiction which is competent to deal with the principal crime also deals with related crimes. If both military and civilian personnel are involved in a crime, ordinary jurisdiction is competent to deal with all of them if the crime is a common one and was not committed on territory declared to be in a state of war; on the other hand, *i.e.*, if the crime is a military one or was committed on territory declared to be in a state of war, the military jurisdiction is competent. If, during the proceedings, the state of war is terminated, the case passes to ordinary jurisdiction.[10]

V. AUTHORITIES AND COURTS OF MILITARY JUSTICE

In judicial districts military jurisdiction is exercised by (1) the Supreme Council of Military Justice, (2) the judicial authorities, and (3) the courts-martial.[11]

Of these, it should be noted that the Supreme Council of Military Justice and the military judicial authorities are permanent bodies, whereas courts-martial are appointed for each individual case and are dissolved when the sentence has been given.

A. *THE SUPREME COUNCIL OF MILITARY JUSTICE*

This is the highest court of military justice and its jurisdiction extends throughout the nation, covering land, sea and air forces. Apart from its judicial functions it also decides questions relating to retirement pensions for military personnel or pensions payable to their families; acts as the Supreme Assembly of the two highest military orders, the Order of St. Ferdinand, for acts of heroic valor, and the Order of St. Hermenegildo, for devotion to service and blameless conduct, directly granted by the Head of State; and provides information dossiers in connection with the retirement of chiefs and officers.

The Supreme Council of Miliatry Justice is composed of a President, a Captain-General or Lieutenant-General of the Army; ten military judges, six of whom are Lieutenant-Generals or Divisional Generals of the Army, two of the Air Force, and two Admirals or Vice-Admirals of the Navy; and six Robed Judges or Councillors, with the rank of Divisional or Brigade General, three of them from the Army Legal Corps, one from the Navy, one from the Air Force, and the sixth taken in rotation from the three

[10] C.J.M., arts. 18–37.

[11] C.J.M., art. 46.

services. Other members, who are only involved in certain specified cases, are a military attorney and another Robed Attorney Councillor, both with the rank of Divisional Generals.

In judicial matters the Council can hold a Council Assembly or a Court of Justice. The Council Assembly gives a single hearing to general officers on charges of common crimes; to the Secretary, Lieutenant attorneys and functionaries of the Council holding rank as an officer, for crimes committed during the exercise of their functions; to attorneys, presidents and members of courts-martial, in the exercise of their functions; to Directors General, Ministers Plenipotentiary and Civil Governors, when they commit offenses subject to the jurisdiction of the military.

The Court of Justice of the Supreme Council of Military Justice has a different composition when it is dealing with common or military and common crimes and when it is dealing with purely military crimes. In the former case it is composed of one military judge as president and four other judges, three of them Robed Councillors and one military; in the second case it is composed of one military judge as president, and four other judges, two of whom are members of the military and the other two being Robed Councillors.

Finally, the Court of Justice examines and confirms, or revokes, sentences which have not been approved or have been brought to its notice by precept of the Law. For these cases, it is composed of seven members: one president (military) and six judges (four Robed and two military); and one president and six judges (three military and three Robed) in the case of military offenses.[12]

The Council Assembly gives a single hearing to military ministers and under-secretaries, the Chief of the General Staff, Chiefs of Staff of the three armed forces, judges and presidents of general officer courts-martial, and finally to civil ministers and under-secretaries, Bishops and Archbishops, the President and attorneys of the Cortes, ambassadors, Magistrates of the Supreme Court of Justice, state counselors and other hierarchies, for crimes falling within the jurisdiction of the military courts.

B. *THE MILITARY JUDICIAL AUTHORITIES*

The military judicial authorities are the Captains-General, or the Admirals, or Chief Generals of a General Captaincy, Naval Base or Department, or Air Zone, on the territory under its jurisdiction and in the forces under its command.

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[12] C.J.M., arts. 84–135.

In matters of military justice the attorney must always be heard, and if no decision is reached in conformity with his verdict the dispute is taken to the Supreme Council of Military Justice. Ministers, chiefs of staff and under-secretaries of the military ministries are not judicial authorities.

Each judicial authority has its Attorney, as stated, or Judge Advocate, and for the execution of its resolutions it has a Secretary of Justice. Both of these officials belong to the corresponding Military Juridical Organization or Corps. Also in each region or zone there is a Military Juridical Fiscal's Office for public action to prosecute in proceedings.

The judicial authorities, with their Judge Advocate, appoint judges, guide proceedings, institute courts-martial and approve sentences or, in case of dispute, take them to the Supreme Council of Military Justice.

The Supreme Council of Military Justice will also review sentences where the death penalty has been imposed, or sentences given against officers condemned to discharge or deprivation of office. The only exceptions are sentences given in cases of treason, spying, sedition, mutiny, insulting a superior, disobedience, armed robbery, or any other crime, which are approved, whatever the penalty imposed, by the judicial authority after the Judge Advocate's report.[13]

C. *COURTS-MARTIAL*

A court-martial is instituted for each individual case by the judicial authority. It may be one of two kinds: an ordinary court-martial, or a court-martial for general officers.

The ordinary court-martial consists of a president, with the rank of Colonel or Lieutenant-Colonel, Commodore or Commander, plus three members with the rank of Army Captain or Naval Lieutenant, and a committee member, a Captain or Commander Judge Advocate.

They are competent to judge all military personnel below the rank of an officer, and civilians not expressly excepted for crimes under the Code of Military Justice.

The court-martial for general officers is composed of a president and three members, all general officers, plus a committee member with the rank of Colonel or Lieutenant-Colonel Judge Ad-

[13] C.J.M., arts. 51–61.

vocate. The three military members may, if necessary, be replaced by Colonels or Lieutenant-Colonels.

This court is competent to judge officers up to the rank of Colonel and other lower ranks holding the Cross Laureate of St. Ferdinand (the highest decoration in wartime for heroism), and also functionaries of the judicial order of ordinary or special jurisdiction, administrative functionaries exercising authority, and generals, for military crimes.[14]

VI. PROCEDURE

When some deed comes to light which may constitute a crime, the head of the corresponding unit or center designates an officer, aided by a secretary, who then proceed to carry out the preliminaries and report to the judicial authority. The latter, through its Secretary of Justice, either confirms the Judge appointed or designates another, registers and numbers the proceedings, and informs the Supreme Council of Military Justice that proceedings have begun.

Examining judges and secretaries are Generals, commanders or officers belonging to the Armed Forces or Corps but not to the Auxiliary Corps. Thus they are not judges trained in the law.[15]

A. *THE SUMMARY*

The initial phase of the examination is called the *summary*[16] or indictment resumé, in which the judge carries out his investigations, takes statements, collects the evidence, and, if he considers that there are indications that a certain person can be charged with a crime or offense, issues a decree of indictment. This is a reasoned decision supported by an account of the facts as known and the crime which may be involved. It will also state whether the accused has been released provisionally, is confined to barracks in the case of military personnel, or is under open arrest for civilians, field officers, Officers and NCO's, or close arrest if the penalty for the alleged crime would be a period of imprisonment longer than six years, or if there were special circumstances. Open arrest, which counts towards any period of punishment imposed later, allows the accused to leave his home when necessary, with the permission of the examining judge, so that civilians may attend their normal work and soldiers may carry out whatever duties are

[14] C.J.M., arts. 62–83.

[15] C.J.M., arts. 136–143.

[16] C.J.M., arts. 532–711.

assigned to them, and both categories may carry out any religious observances to which they are bound.

From the moment the indictment is brought against the accused, he is relieved of the sworn oath and is required to name his defender. An appeal may be made from the decree of indictment within three days of notification, either by the defense or by the accused. The judicial authority's decision on this, in conformity with its judge advocate, is final.

If the accused is not in custody, the police will be requested to detain him and bring him before the Court; he will be summoned to appear before the Court through the pages of the Official State Bulletin and other publications, and, on failure to do so, he will be declared a defaulter, with the approval of the judicial authority and the concurrence of the Judge Advocate. The trial then continues against the other accused, if there are several involved. The Code of Military Justice[17] permits, where there are several accused involved, sentence also being passed against a defaulter, and in this case, when he surrenders or is arrested, he may appeal within eight days to the judicial authority or the Supreme Council of Military Justice, submitting any new evidence. But in practice no sentences are passed against defaulters and this contingency is extremely rare.

During the summary the accused may name his defense counsel. The latter may be a civilian lawyer or a commander or officer if the accused is a civilian, or a soldier in a trial involving common crimes. The defense counsel must be a commander or officer if the accused is a soldier and the crime of which he is accused is a military one. In either case, if the accused waives his right to choose his own defense, an official appointment is made of a military defense lawyer taken from lists compiled for the purpose. Members of the Military Juridical Corps on active service may not act as defense attorneys. Military defense counsel must undertake the defense once appointed, and they receive no compensation.[18]

After the briefing in the summary is finished, the examiner takes it to the Judge Advocate, who may return it if he considers it incomplete. Otherwise, he will propose to the judicial authority that the summary be considered terminated, be filed, and that the proceedings pass on to the second phase, the so-called *Plenary* phase.

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[17] C.J.M., arts. 943–944.

[18] C.J.M., arts. 153–157.

If the foregoing proceedings are terminated without passing on to the second phase, this is called a "supersedeas" or discontinuance, which may be *final*, in which case it has the force of a verdict, or *provisional*, which allows the case to be taken up at a later stage if new evidence appears. The situations in which final discontinuance may be decided upon, or in which provisional discontinuance may be utilized, are found in the Code of Military Justice.[19]

If it appears from the summary that military jurisdiction is not competent to deal with the case, the Judge Advocate, hearing the opinion of the Military Juridical Attorney, will propose that it be handed over to the competent jurisdiction.

B. *THE PLENARY*

In this period, the case enters its public phase and passes to the Military Juridical Attorney, or to a military commander, in cases where only military accused and military crimes are involved, and to the civilian or military defense attorney, whichever is applicable, who assess the facts, indicate which persons are responsible and what were the attendant circumstances, request the corresponding penalty or acquittal, or submit evidence to be put before the Judge or the court-martial. The defense's pleading is also signed by the accused. The Judge may disallow evidence on the grounds that it is negative, and the prosecutor and the defense counsel may appeal this decision to the judicial authority, who gives its ruling after hearing the report of the Judge Advocate. Both prosecutor and defense attorney may attend and witness all evidence presented in the Plenary.[20]

If no evidence is offered, the case is ready for the court-martial. If the defense attorney and the accused are also willing to accept what the prosecutor has requested, and if this is an acquittal or imprisonment for less than three years, the Judge Advocate may propose to the judicial authority that a verdict be given without assembling the court-martial.

If evidence is submitted, the case again passes to the prosecutor and the defense attorney who prepare further prosecution or defense pleadings, which are attached before the case is taken to the Judge Advocate. If standard legal practice has been observed, the Judge Advocate will propose to the judicial authority that the court-martial be assembled, designating the name of the committee

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[19] C.J.M., arts. 718–726.

[20] C.J.M., arts. 727–762.

member (Commander or Captain Judge Advocate) to take part therein.

C. *THE COURT-MARTIAL*

The court-martial is designated by the judicial authority through its Secretary of Justice who, in the appointment of members, follows a strict rota system, this being a safeguard for the accused.

When the composition, date of assembly, hour and place of the court-martial have all been declared, the accused and his defense attorney are notified. They may challenge any of the court-martial's component members, in which case the matter will be settled by the judicial authority after consultation with its Judge Advocate.

Before the court-martial, the Judge recounts the facts, any evidence which has been offered is submitted, the prosecutor and the defense attorney argue their case, and the accused is given the chance to say anything in his own defense.

The members of the court-martial, the prosecutor and the defense attorney may all interrogate the accused or witnesses. This process is done in public, and when it is finished, the court retires to debate in secret session, until it reaches and issues its sentence. The sentence must be unanimous or approved by a majority, and is drawn up by the committee member, who also has a vote, and who puts the sentence into legal form; all members sign it and it is then handed to the examining judge, who notifies the prosecutor and the accused and his defense attorney within twenty-four hours. If the sentence is the death penalty, only the accused's defense attorney is notified. If there is a dissenting minority of members against the sentence, their view is attached to the paper and signed, but their dissent is not notified with the sentence.[21]

D. *APPROVAL OF THE SENTENCE*

Within three days after notification, the prosecutor, defense attorney, and, if he wishes, the accused may appeal the sentence to the judicial authority. After this period the examining judge will forward the case, the sentence and any dissenting votes to the Judge Advocate.

The latter examines the case and proposes to the judicial authority that the sentence, or the dissenting verdict, be approved,

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[21] C.J.M., arts. 763–797.

or that it be put before the Supreme Council of Military Justice, if this is required owing to the nature of the penalty imposed. The judicial authority renders its decision, and if it approves the sentence after consultation with the Judge Advocate, it becomes final. But if it disagrees with the Judge Advocate or court-martial, then the case must be taken to the Supreme Council of Military Justice, and the sentence is not final. Nor is the sentence final when, owing to the nature of the penalty imposed, the case must be taken before the Supreme Council. Neither the Judge Advocate nor the Judicial Authority may base nonapproval of the sentence on a different appraisal of the evidence put before the court-martial, unless there is a case of obvious error, or if the law allows for alternative penalties, in cases where that chosen by the court-martial is not considered suitable.[22]

E. *EXECUTION OF THE SENTENCE*

Sentences are always executed by the judicial authority on a report from the Judge Advocate, including those dictated by the Supreme Council of Military Justice.

The latter authority also carries out general pardons, approves reductions in prison terms, and, in due course, approves the freeing of prisoners after they have served their terms.

VII. THE SUMMARY TRIAL

For persons convicted of military crimes punishable by death or thirty years confinement, who have also been apprehended in *flagranti*, there is a very short procedure justified by the clarity of the proof and the gravity of the breach of discipline or good order of the Army. Under this procedure all steps are accelerated, and sentences may be executed without being taken to the Supreme Council of Military Justice. But, if at any time it becomes necessary to amplify evidence, this summary procedure is suspended and the case is tried in the normal way.

The summary trial is intended only for serious cases of military crime where the evidence is not subject to doubt and it is desired to make an example of the convicted person by rapid punishment.[23]

VIII. APPEALS

We have already mentioned some of the appeals permitted by the Code of Military Justice, but we must make special reference to

[22] C.J.M., arts. 798–807.
[23] C.J.M., arts. 918–937.

the appeal for review, which is the only possible one against final sentences.

This appeal is available only in certain specific cases set forth in the Code of Military Justice, and it is made to the Supreme Council of Military Justice, which may even reverse a previous decision. It is a special appeal, and if a decision is given acquitting the convicted person, there may be compensation payable by the State to the victim of the judicial error, or to his heirs.[24]

IX. THE JUDICIAL HEARING

The Spanish Code of Military Justice does not distinguish between crimes and misdemeanors, since the common penal code does not do so either. But there is a distinction between misdemeanors and offenses. Under the Code of Military Justice offenses are divided into two groups, serious offenses and trivial offenses.

Serious offenses, infringements of a certain gravity, are punished by arrest from two months to six months, and, for privates, by service in a disciplinary corps for the remainder of their compulsory military service.

Serious offenses are defined in the Code and are punished by a judicial process, but the punishment inflicted is intended as a *corrective* rather than a deterrent punishment.

The process is termed a *judicial hearing* and is carried out before a Judge without the intervention of a prosecutor or a defense counsel and is not open to the public. The accused has a list of charges read out to him, which he may deny or extenuate, evidence is submitted, and the examining judge passes the file to the Judge Advocate with his opinion. The latter gives his ruling and the judicial authority decides, either by imposing the corrective punishment or by closing the file. Being a judicial process, a final decision must have the approval of the judicial authority with the opinion of the Judge Advocate.[25]

Trivial offenses are smaller breaches of discipline which are dealt with directly by the superior official. They are also specifically or generically listed in the Code, and the facts are investigated orally or in writing by the immediate superior who administers corrective treatment according to rank or refers them to his superior if he considers such action would exceed his powers. Corrective treatment may be arrest up to two months or a reprimand, and, for soldiers, it may mean fatigue duty. A colonel or

[24] C.J.M., arts. 954–979.
[25] C.J.M., arts. 414–442.

independent group commander may impose up to fourteen days of house arrest on field officers subordinate to him and house arrest or confinement to barracks or ship on officers and NCO's, and up to two months of arrest on soldiers of his unit; he may also raise or lower terms of punishment imposed by his subordinates.

Generals and the minister, under-secretary and Supreme Council, can impose up to two months of arrest for their subordinates.

Article 1007 of the Code contains a special appeal for the person who receives corrective treatment for a trivial offense if he considers he has been wrongly treated. He may take his grievance to the superior of the person who recommended such treatment, and so on up the scale of rank, right up to the Head of State, who may be approached through his dependent ministers. The opportunity to lodge this appeal expires one month after the corrective treatment has been served.[26]

X. CONCLUSION

The benefits of conditional suspension of the punishment awarded are applicable, on the same terms as those laid down by law for persons punishable by ordinary jurisdiction, to those punishable by military jurisdictions for some crime or offense under common law.

In the same way the benefits of conditional liberty after three quarters of the sentence has been served are also open to all persons convicted, on the same terms as in the case of those convicted by ordinary jurisdiction.

And finally, the system whereby a punishment can be worked off, at the rate of one day's punishment compensated for by two days' voluntary work, applies to those serving sentences in military penitentiaries in the same way as in civilian penitentiaries.

This completes the general outline of the military juridical and penal system operating in Spain. Naturally it has not been possible to include all the finer points and details in this brief survey, which only aims at giving an idea of the most important aspects of our military law with sufficient clarity to make it comprehensible to those who live and work under different legal systems.[27]

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[26] C.J.M., arts. 1007–1008 and 443–447.

[27] The Military Law Section of the Francisco de Vitoria Institute (located at No. 4, calle del Duque de Medinaceli, Madrid 14) will be pleased to reply to any request for further or more precise details relating to Spanish military law made by any interested reader of this article.

THE LAW OF THE SEA: A PARALLEL FOR SPACE LAW*

BY CAPTAIN JACK H. WILLIAMS**

I. INTRODUCTION

> The remainder of what a future historian will—only in that future—be entitled to call "The Law of Space," when law is conceived as the community's expectation about the ways in which authority will and should be prescribed and applied, will undoubtedly grow by the slow building of expectations, the continued accretion of repeated instances of tolerated acts, the gradual development of assurance that certain things may be done under promise of reciprocity and that other things must not be done under pain of retaliation. The practice of the various makers of decisions, most of them in the foreign offices of nation states, will be guided by the experience of the past; it is in this way, and not by mechanical translation, that the two great bodies of legal experience with respect to air and the sea will become relevant.[1]

It is logical to assume that the rules to be applied to space law will be formed from existing law. Traditionally, as new situations have arisen, existing rules of law have been reshaped to apply to them.[2] There is no such thing as a new law, which can spring fully clothed from the brow of a scholar, for all new laws are merely adaptations of previous ones, perhaps "dressed up" to create an impression of newness. Man can only build upon his knowledge of the past; so it is with the law. It would seem, then, that we can expect space law to be shaped from earth law, and not "created" as something entirely new and different.

II. THE SEA-SPACE ANALOGY

It is the law of the sea which perhaps provides the best analogies for space. Most writers have looked to air law for applicable rules, but have found little. Actually, the relationship of the sea to the

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, The United States Military Academy, or any other governmental agency.

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[1] McDougal and Lipson, *Perspective for a Law of Outer Space*, 53 AM. J. INT'L. L. 407, 421 (1958).

[2] See, e.g., Pound's discussion in 44 AM. L. REV. 12 (1910).

countries of the world is more nearly akin to the relationship of space to the earth than is the air. The air lies *over* the land below and the law of the air applies *over* the underlying territory, while space *surrounds* the earth like a vast ocean.

As a general rule, the law which governs an airplane is that of the territory beneath it. The airplane is always related to the earth—it must always come down. In space there is no up or down. A spacecraft which has reached escape velocity and passed through the earth's atmosphere is no longer "over" any territory. This is due to the simple fact that the earth is constantly rotating. Thus, a spacecraft launched from any point on the globe would necessarily "pass over" many nations' territories, even if it went in a straight line, although the territories are actually passing beneath it due to the earth's rotation.[3] Therefore, to assert that a nation's airspace extends many miles into space, as some have suggested, is absurd, for such "zones of sovereignty" would be constantly shifting and encompassing new areas of space.[4] Once in outer space, a spacecraft is very like a ship on the high seas—it is in no nation's space, it is over no nation's territory.

The U.N. Ad Hoc Committee found the sea-space analogy worthy of discussion and "unanimously recognized that the principles and procedures developed . . . to govern the use of such areas as . . . the sea deserved attentive study for possible fruitful analogies."[5] Jenks indicated that space presents a much closer analogy to the high seas than to airspace, so far as its legal status is concerned,[6] and several other writers have indicated that the high seas analogy is more useful than that of air law.[7] But to date, only three writers

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[3] A Soviet writer, after the launching of the first Sputnik, declared that "the Soviet satellite did not violate the sovereignty of any state because the territories of these states by dint of the earth's rotation, pass, so to speak, under the satellite's orbit." Zadorozhnyi, *The Artificial Satellite and International Law, Soviet Russia* (Oct. 1957), reported in *Space Law, A Symposium Prepared at the Request of the Hon. Lyndon B. Johnson, Chairman, Special Committee on Space and Astronautics*, 85th Cong., 2nd Sess., (Dec. 31, 1958), p. 504, 506. (Hereafter cited as *Space Law Symposium.*)

[4] As Jenks points out, "Any projection of territorial sovereignty into space beyond the atmosphere is inconsistent with the basic astronomical facts." Jenks, *International Law and Activities in Space*, 5 INT'L & COMPARATIVE L. Q. 99, 103 (1956).

[5] Ad Hoc Committee on the Peaceful Uses of Outer Space, Report, 67, 68, U. N. Doc. (A/4141) (July 14, 1959).

[6] Jenks, *supra* note 4.

[7] See Neumann, *The Legal Status of Outer Space and the Soviet Union: Air Intelligence Information Report*, IR–1184–57 (Feb. 18, 1957), reprinted in *Space Law Symposium* at 495; also Horsford, *The Law of Space*, 14 BRITISH INTERPLANETARY SOCIETY 144, 145, 146 (1955).

have seriously proposed applying the law of the sea to space. Admiral Ward stated that "we shall see a more marked similarity between the doctrine of freedom of the seas and the doctrine governing sovereignty over space, or the lack of such sovereignty" and that "the law of the sea tells us where to look for the authority to back up our rules for space navigation, once we have our technical information." [8] Admiral Ward did not attempt to apply the law of the sea to space as such, but merely indicated that there is much here which is relevant so far as sources for the law of space are concerned. In conclusion, he paraphrased the opinion of the Supreme Court on the *Scotia* case in stating that "the authority behind our rules of space navigation will come from the concurrent sanction of those nations who may be said to constitute the space community." [9]

Yeager and Stark proposed that "Decatur's Doctrine" should be applied to space.[10] The Doctrine, simply stated, is that "The seas beyond reasonable coastal areas are free and subject to control by no single despot or nation, and the sponsors of ships at sea must be responsible for the conduct of their vessels." [11] They indicated that "the most influential contemporary thinking, in fact, leads inescapably to the conclusion that basic maritime and naval principles, as they now apply to the high seas, must eventually be transferred to space." [12] They went on to point out that these rules are therefore the ones which are most likely to develop so far as regulations and utilization of outer space is concerned, but they did not go into any detail as to how this will or should be done.

The Report of the Committee on Law of Outer Space of the American Bar Association noted that there is much in the law of the sea which will be of value in dealing with the problems of outer space.[13]

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[8] Ward, *Projecting the Law of the Sea Into the Law of Space*, JAG J. 3–8 (March 1957).

[9] *Id.* at 8.

[10] Yeager and Stark, *Decatur's Doctrine, A Code for Outer Space?*, 83 U.S. NAVAL INSTITUTE PROCEEDINGS 931 (1957).

[11] *Ibid.*

[12] *Id.* at 931.

[13] "Particular solutions or devices may commend themselves for adaptation; historic failures may enable us to guard against repetition. The law of the sea may afford some hints for the accommodation of inclusive uses like navigation (space flight), fishing (exploitation of mineral or energy resources), and cable-laying (communications) to defensive or exclusive uses like naval maneuvers, protection of customs, and protection of neutrality, and vice versa. Rules of space navigation may draw upon the experience of the law of the sea and of the law of airspace." A.B.A. REP., COMM. ON LAW OF OUTER SPACE, INT'L. & COMP. L. SECT., PROCEEDINGS 215 (1959).

However, the basic point which must be stressed is that the rationale, the needs, and the expectations which helped to develop the law of the sea are essentially the same for space. It is primarily in the area of application that controversy arises.

Most legal writers do not believe that the law of the sea is applicable to space. They argue that "there are very great risks in attempting to transmute a body of law based upon a determined set of facts on the earth into a body of law with respect to celestial bodies as to which the facts have not been determined," [14] or that "we must seek better reasons for our law than that certain rules were appropriate to the law of the seas." [15] Some feel that the law of the sea is too complex to apply [16] or that the analogy is inappropriate.[17] Others indicate that air law is presently applicable, while the law of the sea is not.[18]

At the same time these writers have stressed the need for freedom of outer space, the necessity for a territorial space, and the right of innocent passage through it. Assuming that there is a need—social, economic, or political; assuming that any of these features are desirable in a law of space; we are then faced with the same legal rationale which led to the development of these principles in the law of the sea.

From the above discussion we must conclude that there is sea-space analogy, in the physical as well as in the legal sense.

III. PARALLELS FOR SPACE LAW IN THE LAW OF THE SEA

A. *FREEDOM OF THE HIGH SEAS AND OF THE AIR*

The principle of freedom of the high seas in international law is particularly applicable to outer space. This principle was first set forth by Grotius,[19] who based his proposal on the premise that no nation was capable of exercising dominion over large portions of

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[14] Becker, *United States Foreign Policy and the Development of Law for Outer Space*, JAG J. 4, 30 (Feb. 1959).

[15] Jaffe, *Some Considerations in the International Law and Politics of Space*, 5 ST. LOUIS U.L.J. 382 (1959).

[16] See Beresford, The Legal Control of Outer Space, address at the annual meeting of the American Bar Association, August 26, 1958, reprinted in *Space Law Symposium*, at 410.

[17] See Feldman, An American View of Jurisdiction in Outer Space, paper presented before the International Astronautical Federation, The Hague, August 29, 1958, reprinted in *Space Law Symposium*, at 428.

[18] Aaronson, *Space Law, International Relations*, JOURNAL OF THE DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES 416 (April 1958).

[19] II GROTIUS, DE JURE BELLI AC PACIS, ch. 2, § 3 (1913).

the sea. The principle was not accepted readily by the nations of the world, many of which claimed large portions of the sea. However, the principle of freedom of the seas eventually found wide acceptance, due mainly to the fact that it was impractical and almost impossible to exercise complete dominion over vast regions of the sea. Lauterpacht stated:

> And although Great Britain upheld her claim to the salute due to her flag within the "British Seas," throughout the 18th and at the beginning of the 19th century, the principle of the freedom of the open sea became more and more vigorous with the growth of the navies of other states; and at the end of the first quarter of the 19th century it became universally recognized in theory and practice.[20]

By the time nations did have the ability to exercise complete dominion over the seas, the principle was firmly established.

The first "freedom of the air" proposals found their basis in the law of the sea. Fauchille, in 1906, urged that airspace should be free, and this view was adopted that year by the Institute of International Law at Ghent.[21] Fauchille compared the atmosphere with the high seas and applied the principle of "mare liberum" by analogy.

However, the popular principle of freedom of the air was soon discarded because of the serious military implications. By the end of World War I, nearly every major nation had asserted sovereignty over its airspace. Despite this, the principle of freedom of the air over the high seas remained.

In retrospect, it can be seen that freedom of the air was discarded while freedom of the seas remained, because of very practical considerations. First, it was, and is, easier to exercise complete dominion over the airspace above one's territory than to exercise dominion over a large portion of the sea, and the need to do so was more compelling. All nations have an interest in seeing that sea lanes remain open. With airspace, the subadjacent territory has the primary interest, while other nations have little interest, if any. The military implications, of course, were a major factor in the abandonment of the freedom of airspace principle.

The air sovereignty principle, adopted by virtually every nation,[22] has existed a relatively short time. It may well be that

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[20] I OPPENHEIM, INTERNATIONAL LAW 546 (7th ed. Lauterpacht 1952).

[21] 21 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL 293 (1906); Freedom of the Air, 1 U.S. DOCUMENTS AND STATE PAPERS 303 (State Department, 1948).

[22] The Chicago Convention states that "the contracting states recognize that every state has complete and exclusive sovereignty over the airspace above the territory." Convention on International Civil Aviation, December

the freedom of the air principle will eventually replace it. If the "open skies" [23] proposals of the United States were adopted, freedom of the air could be the end result. Jenks stated that: ". . . we cannot disregard the possibility that the present law relating to sovereignty over airspace, while well established at the present time, may be regarded by future generations much as we regard claims to maritime sovereignty which were more or less successfully asserted for several hundreds of years . . . ." [24]

Young suggested that air sovereignty will disappear, but that "Like the idea of freedom of the seas, the idea of freedom of airspace will require many years to realize . . . ."[25]

The very needs which dictate the making of proposals, such as the "open skies" proposal, indicate that the principle of air sovereignty may not always be an appropriate one; in the light of advancing technology and critical political situations, the principle may no longer be useful.

On the other hand, tested by time and accepted by all, freedom of the seas remains. Various members of the United Nations have emphasized that space is indivisible and hence not subject to the extension of national sovereignty.[26] The subject of space was debated in the United Nations in the fall of 1958, a year after the launching of the Soviet Sputnik. Many nations took stands on the issues involved at that time,[27] and the only agreement which could be reached was that outer space should be used only for "peaceful purposes," a reaffirmation of an earlier resolution to the same effect.[28] The Ad Hoc Committee on the Peaceful Uses of Outer Space took the position that space is free for all to use.[29] They noted that no nation had yet objected to a satellite passing "over" its territory and stated that "with this practice, there may have been initiated the recognition or establishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all

7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591. Though the Soviet Union was not a party, the Air Code of the U.S.S.R. asserts complete and exclusive sovereignty over its airspace. Air Code of the U.S.S.R., COLL. OF LAWS U.S.S.R., 1935, No. 43, p. 359b.

[23] U.S. Dept of State Pub. No. 6046, p. 58, (1955).

[24] *Supra* note 4, at 102.

[25] Young, *The Aerial Inspection Plan and Air Space Sovereignty*, 24 GEO. WASH. L. REV. 589 (1956).

[26] U.N. DOCS. Nos. A/C, 1/SR. 983, 987, 988, 989, 991.

[27] Taubenfeld, *Considerations at the United Nations of the Statute of Outer Space*, 52 AM. J. INT'L. L. 400, 402 (1959).

[28] U.N. Gen. Ass. Resolution No. 1148 (XII), November 14, 1957.

[29] *Report, supra* note 5.

in accordance with existing or future international law or agreements." [30]

Possibly this was speculative, during the time when a satellite presented no apparent danger to the underlying state, but since the launching of the Tiros series, the principle may have been established. As a satellite which photographed the underlying territory, Tiros could have been objected to if any nation felt that its territory was threatened or its airspace violated, but no objections were voiced.[31]

Horsford stated that "in the light of modern international theory, outer space itself is likely to be considered a free navigable area as are the high seas." [32]

The logic of the argument that outer space should be free for all to use is compelling, and, as we have seen, the physical sea-space analogy is logically the only one upon which we can draw. Granted the "freedom of the seas" is not absolute, but neither would we expect the "freedom of space" to be without qualifications. Where they are necessary and given the sanction of the space community, inroads will develop.

If the law of space develops through custom and usage, we can expect to see the principle of "freedom of outer space" develop. On the other hand, if space law were formulated by convention at this time, we would likely see the extension of sovereignty into space—a most undesirable result.

B. *TEMPORARY EXCLUSIVE USE OF THE HIGH SEAS*

An interesting "principle" which has never been seriously challenged is that a nation may claim a temporary exclusive use of a particular portion of the high seas for certain purposes. Thus, for example, nations conducting naval maneuvers, atomic tests, satellite recoveries, or missile tests have over the years claimed the exclusive use of a portion of the high seas for a period of time. They give advance notice to all nations and vessels that such areas are unsafe for navigation during this period, in effect warning all

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[30] *Id.* at 64.

[31] This is further strengthened by a statement, made seven years ago by Professor McDougal, which is no less applicable today. He observed that, "If it is felt by an underlying state that the passing spacecraft endangers its security, it is going to shoot it down if it can, as we have seen some shooting down recently." Proceedings of the American Society of International Law, Fiftieth Annual Meeting, Washington, D.C., April 25–28, 1956, p. 108.

[32] Horsford, *supra* note 7, at 106.

to "stay out." Although the public has become more aware of this practice during recent years because of the atomic tests and the satellite programs, hundreds of these areas have been established for various purposes.[33]

This type of limited recognition of jurisdiction for a time is certainly a part of the international law of the sea, for although there has been little written about it, it is an old, established, and recognized practice. Certainly this is a type of activity which will be carried on in space, whether it be for scientific experiments, maneuvers, or weapons testing. Undoubtedly the practice will be similar, *i.e.*, notification to all to avoid sending spacecraft through a particular area for a time. It is doubtful, from past experience, whether the legality of such a practice could be seriously questioned.

C. *THE TERRITORIAL SEA*

It is a generally accepted principle of international law that every state has jurisdiction over a marginal belt of sea extending from its coastline outward one marine league. Although many nations claim a wider zone,[34] these claims do not have universal recognition. One marine league, or three miles, is the only limit which is recognized absolutely under international law. Within this belt of territorial waters the adjoining state may exercise complete sovereignty, and it is considered, for all practical purposes, as being a part of the adjoining state.

The question then presented is whether it is proper, by analogy, to apply this principle to space, so that each nation would have a similar belt above its territory over which the subadjacent territory would exercise complete sovereignty. Although it is not within the scope of this paper to discuss the various interpretations of airspace or the upper limits of sovereignty, the advisability of drawing an analogy for space law from the three-mile limit should be discussed. If an analogy is to be made, it should be because the reasons for the adoption of the three-mile limit are similar to the reasons for proposing a limit in space, and not merely because we may like the rule.

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[33] McDougal, Burke and Vlasic, *Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L. L. 80, 81 (1960).

[34] See BISHOP, INTERNATIONAL LAW 382 (1954). Bishop lists some of these claims, from data gathered in 1951. Also see Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L. L. 607 (1958).

There has been a long period of misunderstanding concerning the origin of the three-mile limit. In 1702, Bynkershoek [35] stated that territorial waters extend as far as gunfire from the land could reach. By this time the three-mile limit had general recognition. However, it was not until a much later date that artillery had a three-mile range. Therefore, concerning the "cannon shot" theory, Brierly stated:

> Historically, however, this origin is probably mythical; a marine league was more or less generally accepted as the width at a time when the range of gunfire was much less than that. However, according to the British view, that distance became fixed in a definite rule of law about the end of the eighteenth century when the range of artillery was approximately one marine league . . . .[36]

We can see then that the actual origins of the three-mile limit are somewhat obscure. If we adhere to the "cannon shot" theory, the reason behind the limit would be force—a disappointing theory upon which to build the law of space. We should note, however, that the territorial sea emerged during the period when the claims of sovereignty over vast areas of the sea were being discarded and the principle of freedom of the high seas was emerging. It is likely that jurisdiction was retained over the area one marine league from shore for very practical reasons. It is within this area that activities would be primarily those of the adjacent state. An assertion of sovereignty would be necessary here in order to have effective regulation of seaports and commercial fishing. Even disregarding its possible origins, we can see that the principle has existed for nearly two hundred years, during most of which shore control could extend well beyond three miles. It would seem that if the purpose was for defense, the limit would have been extended as arms developed. Obviously, it has not been extended because, in most instances, there was no need to do so. The adjacent state's primary interests were in near-shore acitvities.

Also, a universal extension of the territorial sea would seriously limit the freedom of use of the high seas. The use of smaller bodies of water, such as the Mediterranean Sea, would be hampered as well. Shipping lanes and air traffic would have to be rerouted, and many fishing fleets would be unable to operate on

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[35] BYNKERSHOEK, DE DOMINIO MARIS 364 (Carnegie Endowment ed. 1923).
[36] BRIERLY, THE LAW OF NATIONS 177 (5th ed. 1955).

waters which they had traditionally used. There are also significant defense problems which would be created.[37]

Of course, many nations, even those with a three-mile limit, exercise jurisdiction far beyond this point for various purposes. But it should be noted these are exercises of jurisdiction for specific purposes, such as customs control, rather than claims to sovereignty.

If the interests and needs of the subadjacent state are sufficient to retain the theory of air sovereignty, we are likely to see a slight extension of sovereignty into space to include those activities of particular interest to the state below, but this should not extend beyond the lowest level at which a satellite could orbit, *i.e.*, somewhere below 140 miles.[38] To go beyond this would be impractical, since satellites would continually "violate" the territorial space of many nations. Even at this height, "space boundaries" of various nations would be difficult to determine, and the problems created would be more complex than any problems which they would solve, *e.g.*, how large a "cone" of space would Monaco or Switzerland get? If there is a logical reason for nations to have a certain amount of territorial space, then a limit may be set, but, of necessity, it must be low. However, if such extension of sovereignty is not considered useful because of the difficulties of setting an exact limit and problem presented by the constant rotation of the earth, then the territorial sea analogy will be limited to airspace, as it is today. Therefore, the application of the territorial sea analogy to space law will depend upon the future status of the air sovereignty principle.

D. *CONTIGUOUS ZONES*

Beyond the territorial seas of nearby every nation lie the contiguous zones. These so-called contiguous zones are created by

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[37] Dean notes that with such an extension enemy submarines could lie undetected in the territorial waters of a neutral state and discharge missiles, while surface craft could not invade these waters to hunt them without violating the adjacent state's neutrality. He also observes that: "Such an extension of the territorial sea might for navigational purposes, change the Aegean Sea into a series of unconnected lakes of high seas. Our Sixth Fleet might not then be able to operate there and its ability to maneuver would be greatly decreased; our aircraft might not be able to overfly newly created territorial seas. Without such right, the recent landing of United States forces in Lebanon might not have been legally possible, and the presence and movements of the United States' Seventh Fleet and its aircraft in defense of the Nationalist Chinese islands of Quemoy and Matsu would have been seriously impeded." Dean, *supra* note 34, at 611, 612.

[38] Ehricke and Van Allen, *Space Flight*, Astronautics (Nov. 1958), pp 46, 124.

the extension of jurisdiction beyond the territorial sea for particular purposes, usually for customs purposes or the conservation of sea food. Thus, for example, the United States claims up to twelve nautical miles for customs purposes [39] and jurisdiction over the continental shelf for conservation purposes.[40]

At the 1958 Geneva Conference, the parties adopted a provision limiting the contiguous zone to not more than twelve miles from the coastal baseline and recognizing the power of the coastal state to "prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea," and "punish infringement of the above regulations committed within its territory or territorial sea." [41]

There are contiguous zones, however, which go beyond those specified by the Conference.[42] Where they exist merely as unilateral declarations, they are not always recognized. Thus, for example, the 200 mile claims of Chile, Ecuador, and Peru for exclusive fishing rights stand alone as unilateral declarations.[43]

It should be noted that the convention indicates that punishment for infringement of these regulations by the coastal state is permissible only where the violation has been committed within the territory of the state itself or within its territorial sea. Thus, punishment by the coastal state for violations committed solely within the contiguous zone is prohibited. The failure of the Conference to consider claims for other purposes within the contiguous zone has been criticized,[44] and perhaps rightly so, since the adopted article is of little value unless it could be expanded to cover all existing claims and uses. For example, there was no consideration given to military inspection within the contiguous zone. It may be that it is proper to treat military inspection and defense considerations separately; however, any activity within this area is still within the "contiguous zone" and it really makes no difference if you label it a "military inspection" zone or "defense identification" zone. There is a reason for separate treatment only if there is a requirement for a separate limit.

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[39] 49 Stat. 517, 19 U.S.C. § 1701 (1958).

[40] Presidential Proclamation of September 28, 1945, 40 AM. J. INT'L. L. SUPP. 46, 47 (1946).

[41] Article 24, Convention of the Territorial Sea and the Contiguous Zone, U.N. Doc. No. A/CONF. 13/L. 52, reprinted in 52 AM. J. INT'L. L. 834, 840 (1958).

[42] McDougal, Burke and Vlasic, *supra* note 33, at 88–93.

[43] Particularly those claiming exclusive fishing rights, *id.* at 88, 90.

[44] *Ibid.*

The limited activities in space to date indicate that nations may have interests in a number of different types of activities which occur "overhead," so to speak, in the "near space" area. We have seen, for example, various communications experiments, considerable use of radio and television signals, observation of territory, manned flight, and atomic testing. In the future we can expect considerably more in the way of communications—allocation and use of radio frequencies could become a problem. Scientific experiments in space will become numerous, to say nothing of the possible security implications. Possibly we could encounter propaganda radio and television shows beamed from satellites, or even garbage from passing spacecraft.

The use of contiguous zones is more likely to find application in the law of space than that of the territorial sea. Remembering that it is not a claim to exclusive sovereignty, but rather an exercise of jurisdiction for a particular purpose, we can see that this doctrine is easier to apply and certainly has a firmer basis. Thus, we could more readily accept "zones" extending above a subadjacent state for the purpose of controlling weather, protecting the state from polution by passing spacecraft, preventing interference with communication, or any other objective that would clearly be of greater importance, and in some cases a necessity, to the state below than to another state. If such a state has this particular interest in regulating activities in the near-space above (such as health and safety considerations), and the ability to control these activities, then we are likely to see a type of contiguous zone emerge in space law. But it must be remembered that this analogy is subject to many of the limitations in space which also apply to the territorial sea analogy considered *supra*.

E. *DEFENSE IDENTIFICATION ZONES*

A type of contiguous zone which is more likely to be applied in any law of space is illustrated by the Defense Identification Zones established by the United States.[45] Within these zones, which extend far beyond the territorial sea, foreign aircraft must report their presence and identity when they are one or two hours' cruising distance from shore. Rather than being contiguous zones extending into the open seas, these are contiguous zones extending into the free space above the high seas. While they are purely

[45] Civil Aeronautics Acts of 1938 § 1201 as amended, 72 Stat. 800, 49 U.S.C. § 1521 (1958).

a defense measure,[46] the applicability of identification zones in space seems inevitable, though likely for other purposes. When manned space flight is a reality, nations will undoubtedly reserve the right to require low-flying spacecraft to identify themselves and be designated to particular glide paths [47] in order to avoid collisions, protect property below, and probably also for defense purposes. Here we see an area where the extension of jurisdiction is fully justified by the interests of the states below. Although the Defense Zones are technically a part of air law, they are mentioned here because they have a relationship to maritime contiguous zones and illustrate more fully their analogy to space.

When space travel reaches a more sophisticated stage, we are likely to see the adoption of practices which are closely analogous to the contiguous zone—defense identification zone situations. First of all, a spacecraft taking off from any location on earth would be picked up instantly by any nation through the use of satellite scanning devices. Unless it had a near-earth mission, there would be no further need for concern. In the case of a near-earth mission, such as a trip to a space station with supplies, its mission would be stated in advance, and presumably such runs would become a common routine, such as scheduled air flights. In the case of non-scheduled runs, however, and craft returning to earth from satellite stations or deep space, the craft would send an identifying signal at a certain distance which would be picked up by satellite relays or earth monitors. The signal would identify the craft, its nationality, and glide path, and it would be monitored by the subadjacent nation or nations concerned. This would be useful, not only as a military defensive measure, but also to fix liability for torts which could be caused by the passing spacecraft. A satellite relay, for example, could automatically "buzz" any spacecraft at a set distance or approach with an automatic identification request signal. If no reply came, then the craft could be followed in by anti-missile rockets. In the case of low-level scientific experiments, a nation or group of na-

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[46] Cooper states: "This is a clear application of the right of self-preservation and self-defense applicable outside national territory and within international flight space." Cooper, *Space Above the Seas*, JAG J. 8 (Feb. 1959).

[47] A manned spacecraft would need a long "glide path" in order to decelerate sufficiently to avoid burning up when entering the atmosphere. Regardless of where the ship might land, its glide path would probably extend over the territories of several states. Space Handbook, Astronautics and Its Applications, STAFF REPORT OF THE SELECTED COMMITTEE OF ASTRONAUTICS AND SPACE EXPLORATION, H. R. DOC. No. 86, 86th Cong., 1st Sess. 88–95 (1959).

tions could require that these be carried on only over the high seas, or over barren areas where they would not affect, for example, forests, farm regions, or fishing grounds.

F. *INNOCENT PASSAGE*

The one limitation on the sovereignty of a state over its territorial waters is the right of innocent passage by ships of other nations through these waters. This ancient rule, recently reaffirmed in the *Corfu Channel Case*,[48] is again a rule of necessity which grew in order to further freedom of navigation. It is strictly limited to "innocent" passage, but also applies to warships during peacetime.[49]

This principle will have obvious application in space law with regard to the "glide paths" previously discussed. Assuming that air sovereignty is retained, a principle such as this would be requisite so that spacecraft will have the necessary freedom of movement to land and take off from the earth. This is an example of a direct analogy from the law of the sea which can be applied in space with little modification.

G. *JURISDICTION OVER VESSELS*

Considering the nature of space and its infinite reaches, we will see that when many nations are engaged in space activities the largest body of space law will evolve from the well-established principle of maritime law that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong.

Gidel indicated that the nationality of vessels is the practical means by which the judicial order of the high seas is organized, thereby establishing a judicial order for every vessel on the high seas.[50] By means of this method, every nation's law controls activity aboard its vessels; that nation is responsible for the conduct of such vessels, and that nation protects its own vessels. A vessel having no nationality has no protection. Lauterpacht asserted that, "In the interest of order on the open sea, a vessel not sailing under the maritime flag of a state enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a state." [51]

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[48] The Corfu Channel Case, [1949] I.C.J. Rep. 4.

[49] *Ibid.*

[50] I GIDEL, DROIT INTERNATIONAL PUBLIC DE LA MER 230 (1934).

[51] II OPPENHEIM, *supra* note 20, at 546.

As this rule creates a body of law for the open seas, we can expect a similar law to arise with regard to space. In an area as vast as space, the only law for a spaceship's internal regulation will be the law imposed by the nation under whose nationality she travels. The ship's protection from interference by other craft will come from that nation. Her rights and duties will exist only by virtue of the fact that she has nationality. Therefore, it will be necessary for spacecraft to have a nationality, as well as a means of displaying such nationality.[52]

1. *Nationality of a Spaceship*

In order to have lawful conduct of spaceships as with sailing vessels, they must have a nationality, and by virtue of such nationality will come a host of legal principles which will govern internal and external relationships of such craft when they are far from this earth—deep in space.

As the problem has arisen in maritime law, it is possible that the problem of what criteria to apply to determine nationality of a spacecraft may arise. For example, at some future date when nations having the ability to manufacture spacecraft, sell them to other nations, what would be the national character of a privately owned vessel with a U.S. registration and a French crew under contract to conduct space research for a French firm? A very real problem could arise if such a craft crashed on a large city or collided with another spacecraft. However, the question of actual nationality is not likely to arise for some time because of the prohibitive cost of building such craft, which will in all probability limit ownership to nation-states.

2. *Jursdiction Over Torts and Crimes in a Spaceship*

There is no reason to believe that there will not be crimes and torts committed in space. Certainly murder or larceny in space would still be murder or larceny. Thus, the nation sending a spacecraft would have to have jurisdiction over the persons aboard for the purpose of trying them for crimes and jurisdiction for personal tort cases. Thus, we can expect to see the extension of jurisdiction over the person of the space traveler by the state sending the craft. This would be similar to the jurisdiction of the United States over military persons, but would be broadened to include torts, regardless of where they are committed. This departure from the law of the place concept will be necessary in order for the sounding state to provide a forum for civil wrongs,

[52] More than a visual symbol is needed because of the speed at which spacecraft can travel. Perhaps a fixed type radio signal may be the answer.

acts of negligence, etc., whether they are committed in the spacecraft, outside the craft, or on an alien planet. Criminal jurisdiction, of course, follows the existing pattern, thus the master of the spacecraft will become, like the captain of a ship, the "last absolute monarch."

H. *SHARED USES FOR PARTICULAR PURPOSES*

It was recognized at the Geneva Convention on the Law of the Sea [53] that with respect to certain activities, particularly fishing, it was necessary for nations which constantly used an area of the high seas for fishing to agree upon a program of conservation which would also apply to new states which come to fish in this area.[54]

This, in principle, equates such commercial activities with the freedom of navigation so far as importance is concerned; in other words, there should be shared uses of the high seas for these purposes as there are for other purposes such as equality of access for navigation.[55] Though somewhat limited, this is an area which may be paralleled in space law. McDougal suggested probable "shared uses" of such activities as television relay stations in space, the transmission of scientific data, and scientific observation.[56] We are likely to see a mutual tolerance of shared uses of space, but it is difficult at this time to determine exactly what activities will be carried on there.

It seems reasonable to assume, however, that there will be scientific experiments carried on jointly by several nations, as well as manned space stations, perhaps jointly manned or sharing orbits with those of other nations. This certainly would be somewhat of an exclusive use or control over a portion of space, but because of rotation, if for no other reason, the concept of sovereignty would be inapplicable and the station itself would have to be treated as a vessel on the high seas. The Air Force's "Texas Towers" provide a closely analogous situation.

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[53] United Nations Conference on the Law of the Sea, Geneva, February 24–April 27, 1958.

[54] Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. No. A/CONF. 13/L. 54, reprinted in 52 AM. J. INT'L. L. (1958).

[55] See McDougal, *supra* note 42, at 72, who asserts that shared uses also extend to vessels with regards to stopping of other vessels suspected of damaging submarine cables, citing the Russian trawler incident.

[56] McDougal and Lipson, *supra* note 1.

IV. CONCLUSION

There are many useful analogies in the Law of the Sea which may be applied to space. This is not to suggest that a whole set of rules for one context should be lifted up and automatically applied to another. Such action would be foolish. However, principles of international law for the sea have grown over many hundreds of years through custom and usage. In the final analysis, it is necessity which has led to the adoption of many of these principles by the nations of the world.

For example, as with the sea, laws for space will be adopted because they are needed and only in areas where they are needed. It would seem, though, that space law need not go through the long period of evolution which the law of the sea has undergone, for these concepts and principles have been developed already and now need only to be applied.

As we have seen, the principle of freedom of the seas is particularly applicable to space, and it is this principle, rather than the extension of sovereignty, which is likely to gain acceptance. Admiral Ward has noted that "space is free because no one has yet devised an effective means for rendering it unfree." [57] Obviously, it would be possible for one nation to prevent others from going into outer space, but as unpleasant as the military overtones may be, they must be considered in formulating and adopting a law for space.

It would be wise to avoid an international convention on space law because of the dangers and disadvantages of such a convention on this subject. As long as there are but two nations with space capabilities, we must preserve freedom of action and promote activities rather than agreement at this time.[58] The principle of "freedom of space" will eventually be firmly established, as, I believe, also will be the "right of innocent passage through territorial space." These, together with the principle of nationality of spacecraft, will form the basis of what, in the future, will be the law of space.

Although it has been urged that we "begin now with the develop-

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[57] Ward, *Space Law as a Way to World Peace*, JAG J. 24 (Feb. 1959).

[58] Ward notes that "whom the Communists would destroy, they first invite to co-exist and offer a non-aggression agreement," therefore it "would be premature and dangerous to commit ourselves at this time to a code of laws which would control our activities in space." *Id.* at 27, 28.

ment of rudimentary space law," [59] we have seen [60] that activities in space to date may have already established the first principle of space law—Freedom of Outer Space. If this is so, then the troublesome concept of sovereignty will be barred from space, and the development of space law will be rapid. Logically as well as astronomically, sovereignty has no place in space.[61] While all the answers are not to be found in the law of the sea, it is from this ancient body of law that the basic principles will come, for they have been carefully tested by time and are applicable. Many of the same problems which led to their establishment now face us in space. Given time for careful reflection, we must agree that hasty or compromised rules should not be applied to an area as large and as lasting as the universe. As VonBraun once stated, "We stand at the beginning of a wide, endless highway reaching out to the stars and beyond." [62]

[59] STAFF OF THE SELECT COMMITTEE ON ASTRONAUTICS AND SPACE EXPLORATION, 86th Cong., 1st Sess., REPORT ON SURVEY OF SPACE LAW 36, H.R. DOC. No. 89 (1959).

[60] See section II of this article.

[61] See Jenks, *supra* note 4, at 102.

[62] Von Braun, *How Big is Space?* 22 TEX. BAR J. 477, 479 (1959).

FIVE-YEAR
CUMULATIVE INDEX
MILITARY LAW REVIEW

(DA Pams. 27–100–1 through 27–100–22)

This is the first of what is planned as a regular five-year cumulative index to the *Military Law Review*. Annual cumulative indexes have been published previously in issues 4, 8, 14, and 18, and a three-year cumulative index was published in issue number 12. Annual indexes will continue to be published in the October issue of each year, and a five-year cumulative index will again be published in issue number 42.

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By Order of the Secretary of the Army:

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